United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7428

In The

United States Court of Appeals

For The Second Circuit

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM,

Plaintiffs-Appellants,

-against-

EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F.I. duPONT GLORE FORGAN & CO. and duPONT GLORE FORGAN INCORPORATED,

Defendants.

(Continued on Reverse)

UNITED STATES COURT OF APPEALS
FILED
NOV 19 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX

Volume I, 1a - 320a

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and

HASKINS & SELLS and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants-Appellees.

On Appeal from an Order of the United States District Court for the Southern District of New York.

PAGINATION AS IN ORIGINAL COPY

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CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE CARTER

Jury demand date:

72 CIV. 775

Form No. 106 Rev.

TITLE OF CASE

HOWARD C. HIRSCH, PAUL L. KOHNS AND MARSHALL S. UNDHEIM

AGAINST,

EDMOND DUPONT,
WALLACE C. LATOUR,
MILTON A. SPEICHER,
FRANCIS I. DUPONT & CO.
F.I. DUPONT,
GLORE FORTAN & CO.
DUPONT GLORE FORGAN INCORPORATED,
HASKINS AND SELLS AND
NEW YORK STOCK EXCHANGE INC,

ATTORNEYS

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Cadwalader, Wickersham & Taft
(for deft Edmond duPont) One Wall St.
NY 10005 425-3000

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk	2/23/72	Shea Gould Climenko & Kramer	15 —	15 —
J.S. 6 mailed	Marshal				
Basis of Action: S.E.C. ACT. 1934	Docket fee				
$1,000,000.00	Witness fees				
Action arose at:	Depositions				

[redacted]

EDWARD C. HIRSCH, ET-AL VS. EDMOND DUPONT, ET-AL

Brieant, J. JUDGE C.M.T. 72 CIV. 775

DATE	PROCEEDINGS	Date Order Judgment N
FEB23-72	FILED COMPLAINT. ISSUED SUMMONS.	
Mar.16-72	Filed stipulation and order extending deft. duPont Glore Forgan Inc.'s time to answer complaint to 4/25/72. So ordered. Metzner, J.	
Mar.20-72	Filed stipulation and order extending deft. Haskins & Sells time toanswer complaint to 4/25/72. So ordered. Bauman, J.	
Mar.22-72	Filed stipulation and order extending defts. Wallace C.Latour, Milton A.Speicher, Francis I.duPont & Co. and F.I.duPont, Glore Forgan & Co.'s time to answer complaint to 4/25/72. So ordered. Bauman, J.	
Mar 30.72	Filed Stip & Order extending time for N.Y.Stock Exchange, Inc Dft. to answer to 4/25/72. So Ordered Gagliardi J.	
Apr 12.72	Filed Stip & Order extending time for dft. Edmond duPont to answer to complaint x to 5/1/72. So Ordered Motley J.	
APR 24-72	Filed summons with marshal's return. Served Edmond DuPont on 3/20/72.	
"	Also served Wallace Latour by Jane MacDougall on 3/9/72.	
"	" " Milton A. Speicher on 2/28/72	
"	" " Francis I. DuPont & Co. by Milton A.Speicher on 2/28/72.	
"	" " F.I. DuPont, Glore Forgan & Co. on 3/14/72.-unable to serve	
"	" " DuPont Glore Forgan Inc. by Jane Larkin on 3/7/72.	
"	" " Haskins and Sells by Gordon Murray on 2/28/72.	
"	" " New York Stock Exchange, Inc. by Mr. Gerald F.Clark on 3/10/72.	
pr 26.72	Filed Notice of motion by dft. Re: More Definite Statement. ret. 5/9/72.	
Apr 26.72	Filed Memorandum of dft. exchange xin support of motion for a more definite statement.	
Apr 27.72	Filed Stip & Order of dft. Haskins & Sells extending time to answer to complaint from 4/2[illegible]72 to 5/10/72.	
May 4.72	Filed Stipulation & Order extending time for dft. Edmond duPont to answer to complaint to 5/15/72. So Ordered Lasker J.	
ay 8.72	Filed Stipulation adjourning motion of dft. NY Stock Exchange Inc. ret. 5/9/72 to 5/23/72.	
May 11.72	Filed Dfts. Speicher, Francis I.duPont & Co., & F.I. duPont, Forgan & Co., Notice of Examinationupon XXXXXXXXXXXX Pltffs.	
May 11.72	Filed Notice of Appearance.	
May 11-72	Filed stipulation and order extending defts. Latour, Speicher, Francis I.duPont & Co. and F.I.duPont, Glore Forgan & Co.'s time to answer complaint to 6/1/72. So ordered. Lasker, J.	
ay 11-72	Filed stipulation and order extending deft. DuPont Glore Forgan, Inc.'s time to answer complaint to 5/16/72. So ordered. Lasker, J.	
May 15.72	Filed Dft. Haskins & Sells ANSWERXXX & CROSS CLAIMS.	CGSR&
ay 22.72	Filed Stip & Order extending time for dft. Edmond duPont to answer to complaint to 6/9/72. So Ordered Frankel J.	
ay 24-72	Filed stipulation and order extending deft. duPont Glore Forgan Inc.'s time to answer complaint to 5/29/72. So ordered. Frankel, J.	
May 31.72	Filed Dft. duPont Glore Forgan Inc,. ANSWER & Cross Claims, to complaint.	WG&M
ay 31.72	Filed Dft. duPont Glore Forgan Inc. ANSWER & Cross Claims to dft. Haskins & Sells.	
MAY 31-72	Filed Notice of Appearance.	
May31-72	Filed stipulation and order extending time of deft. Edmond duPont to answer cross-claims to 6/30/72. So ordered. Cannella, J.	
un 2.72	Filed Stip & Order extending time for dfts. Milton A.Speicher, Francis I.duPont & Co., & F.I.duPont, Glore Forgan & Co., to answer to complaint to 6/30/72 etc. So Ordered Cannella J.	
un 6.72	Filed Stip & Order extending time for N.Y.STock Exchange Inc. to reply to cases claim of Haskins & Sells to 6/26/72. So Ordered Cannella J.	

Continued

[redacted]

ard C. Hirsch et al vs. Edmond Dupont, et al. Pg#3

JUDGE CARTER ~~JUDGE CARTER~~ Brieant

D. C. 110 Rev. Civil Docket Continuation

72 Civil 775

DATE	PROCEEDINGS	Date Ord Judgment
Jun 8.72	Filed Affidavit of Richard L. Spinogatti.	
Jun 8.72	Filed Memorandum of Law in opposition to dft. N.Y. Stock Exchange Inc. Motion for a more definite Statement.	
Jun 13.72	Filed ANSWER & Crossclaims of dft. Edmond duPont.	CW&T
Jun 13.72	Filed Dft. du Pont Glore Forgan Inc. ANSWER to Crossclaims of Edmond duPont	WG&M
Jun 20.72	Filed ANSWER TO Crossclaims of dFt. Haskins & Sells by dft. Edmond duPont.	
Jun 20.72	Filed ANSWER to crossclaims of dft. duPont Glore Forgan Inc. by dft. Edmond duPont.	CW&T
Jun 21.72	Filed ANSWER of dft Exchange to Cross Claims of dft. Edmond duPont.	CW&T MTH&
Jun 21.72	Filed ANSWERof Dft. Exchange to Crossclaims of Dft. DuPont Glore & Forgan Inc.	MTH&
Jun 13-72	Filed (in court) Reply Memorandum of Deft. in support of motion.	
Jun 28-72	Filed MEMO.END. on motion papers filed 4/26/72. Motion granted as to items (a) and (b), notice of motion, April 25, 1972. Otherwise motion is denied. So ordered. Cooper, J.	
Jun 28/27	Filed Stip & Order extending time for dfts. M.A Speicher, F I. duPont Glore Forgan & Co. to answer to cross claim of dft. is extended to 9/20/72. So Ordered Brieant J.	
Jun 29.72	Filed Dft. Wallace C. Latour ANSWER.	RK&W
Jun 29.72	Filed ANSWER of Dft. Latour to cross claims of Dft. duPont Glore Forgan Inc.	
Jun 29.72	Filed ANSWER of dft. Latour to cross claims of dft. Haskins & Sells.	
Jun 29.72	Filed ANSWER of Dft. Latour to cross claims of dft. Edmond duPont.	
Jun 30.72	Filed Dft. duPont Glore Forgan Inc. ANSWER to cross claim.	
Jun 30.72	Filed Stip & Order for the dfts. Haskins&Sells & dfts. Milton A. Speicher, Francis I.duPont & Co., Fi.I. du Pont Glore Forgan & Co., to reply to the cross clim of dfts. Haskins & Sells is extended to 9/20/72. Brieant J.	
Jun 30.72	Filed Stip & Order extending time to reply to cross claim of Edmond duPont for dfts. M.A. Speicher, F.I. duPont & Co., F.I. duPont, Glore Forgan & Co. to 9/20/72. So Ordered Brieant J.	
Jun 30.72	Filed Stip & Order the depositions of apltffs.now ret.7/5/72 to 7/7/72 be adjourned to 9/20/72 to 9/22/72.,etc. & that the time for dfts. M.A.Speicher, Francis I.duPont & Co.,& F.I.duPont, Glore Forgan & co., is extended to 9/10/72 to answer to complaint. So Ordered Brieant J.	
JUL6-72	FILED DEFTS ANSWER EDMOND DUPONT TO CROSS-CLAIMS OF DEFT WALLACE C. LATOUR.	cC W &
Jul 13-72	Filed Amended Complaint.	
JUL 20 72	Filed Stip & Order that time which deft Wallace C Latour must answer or move re: amended complaint is ext. to Aug. 22 1972. So Ordered- Brieant J.	
Jul 21-72	Filed ANSWER OF DEFT N.Y. STOCK EXCHANGE TO CROSS CLAIMS of deft WALLACE C. LATOUR.	
Jul 25-72	Filed defts exchange Answer to amended complaint and Cross Claims	MTH&M
JUL 25 -72	Filed Stip & Order that time for deft duPont Glore Forgan Incorp. to move or answer re: amended complaint is ext. to Aug. 22 1972. So Ordered- Brieant J.	
ug 1-72	Filed defts HASKINS & SELLS ANSWER to amended complaint and cross claims.	CGSI
Aug4-72	Filed stip & order that the time for deft Edmond DuPont to answer to the amended complaint. is extended to Sept. 1, 1972. Frankel, J.	
Aug 9-72	Filed ANSWER OF DEFT EDMOND DUPONT, TO CROSS CLIMS OF DEFT HASKINS & SELLS.	CW&T
Aug9-72	FILED ANSWER OF DEFT. EDMOND DUPONT TO CROSSCLAIMS OF DEFT N.Y. STOCK EXCHANGE,	CW&T.

2 Civ 775 HOWARD C. HIRSCH, et al -v- EDMOND DuPONT, et al. 72 Civ 775

Boyd J.

DATE	PROCEEDINGS	Date Order Judgment Not
Aug18-72	Filed answer of deft Haskins & Sells to cross-claims of deft Exchange.	
Aug 18-72	Filed answer of deft Haskins & Sells to cross-claims of deft duPont.	
Aug18-72	Filed answer of deft Haskins & Sells to cross-claims of deft Edmond duPont	
Aug18-72	Filed answer of deft Haskins & Sells to cross-claims of deft Latour.	
Aug11-72	Filed answer ofndeft duPont Glore Frogan Inc to cross-claims of New York Stock Exchange, Inc.	
Aug11-72	Filed answerof duPont Glore Forgan Inc to cross-claims of Haskins & Sells.	
Aug17-72	Filed answer of deft Latour to cross-claims of deft N.Y. Stock Exchange.	
Aug17-72	Filed answer of deft Latour to cross-claims of deft Haskins & Sells.	
Aug17-72	Filed deft Wallace C. Latour's ANSWER to the amended complaint and cross-claims.	RKW
Aug22-72	Filed answer of duPont Glore Forgan to cross-claims and ANSWER to Amended Complaint.	
Aug23-72	Filed answer of deft Exchange to cross-claims of deft Haskins & Sells asserted in the amended complaint.	
Aug23-72	Filed answer of deft Exchange to cross-claims of deft Wallace C.Latour asserted in the amended complaint.	
Aug.25-72	Filed Answer of deft. Latour to cross-claims of deft duPont Glore Forgan Inc.	
Aug.30-72	Filed ANSWER of deft. Edmond duPont to complaint, and cross-claims of deft. Edmond duPont.	C&T
Aug.30-72	Filed Answer of deft. Edmond duPont to cross-claims of deft. Wallace C.Latour.	
Aug.30-72	Filed Answer to cross-claims of deft. duPont Glore Forgan Inc.	
Sept 5-72	Filed ANSWER OF DEFT LATOUR TO CROSS CLAIMS OF DEFT EDMOND DUPONT.	RK&W.
Sept6-72	Filed ANSWER OF DEFT DUPONT GLORE FORGAN INCORP. TO CROSS CLAIMS OF DEFT EDMOND DUPONT.	WG&M
Sept7-72	Filed ANSWER OF DEFT NEW YORK STOCK EXCHANGE, INC. TO THE FIRST AND SECOND CROSS CLAIMS OF DEFT EDMUND DUPONT.	xx MTH&M
Sep.11-72	Filed Answer of deft. Haskins & Sells to cross-claims of deft. Wallace C.Latour, as set forth in his answer to amended complaint.	
Sep.14-72	Filed ANSWER of Francis I.duPont & Co.,F.I.duPont,Glore Forgan & Co. and Milton A.Speicher to Amended Complaint, and cross-claims of defts.	P&S
Sep.14-72	Filed Answer of deft. Exchange to cross-claims of deft. duPont Glore ForganInc. asserted in amended complaint.	
Sep.15-72	Filed Answer of deft. Haskins & Sells to cross-claims of deft. duPont Glore Forgan Inc. as set forth in its answer to amended complaint.	
Sep 20-72	Filed Stip and Order that depositions of pltffs now scheduled for 9-20-72are adj'd to 10-25,26,27-72 and that defts M. Speicher,F.I. duPont & Co and F.I. duPont, G.Forgan & Co shall retain their priority of discovery and shall be entitled to conduct the first depositions of pltff. TENNEY,J.	
Sep 21-72	Filed ANSWER of deft Edmond duPont to cross-claims of defts Francis I. duPont & Co, F. I. duPont, Glore Forgan & Co. and Milton A. Spiecher.	
Sep.25-72	Filed Answer of Deft. Haskins & Sells to cross-claims of deft. Edmond duPont.	
Oct.3,72	Filed ANSWER of Deft Haskins & Sells to Cross-Claims of Defts Francis I.duPont & Co.F.I.duPont,Glore Forgan & Co and Milton A.Speecher as set forth in their Answer to Amended Complaint.	CCSR&C
Oct 5,72	Filed Answer to the Cross-claims of Defts Francis I. duPont & Co.F.I.duPont Glore Forgan & Co. and Milton A. Speicher.	
Oct.6,72	Filed ANSWER of Deft Exchange to Cross Claims of Defts Francis I.duPont&Co.V.I.du Pont Glore Forgan & Co and Milton A.Speicher asserted in their ANSWER to Amended Complaint.	MTH&M
Oct.12,72	Filed Deft's duPont Glore Forgan Incorp.'s Answer to Cross-Claims of Defts. Francis I.du Pont & Co.et al asserted in Amended Complaint.	WG&M
Oct.27 72	Filed Stip & Order extending pltiff's' time to answer Defts Speicher,Francis I.duPont &Co,F.I.duPont,Glore Forgan Co be extended from 11/25-27 to 11/29-12/1 72.	

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[redacted] JUDGE CARTER ~~JUDGE CARTER~~

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Orde Judgment
Nov.28,72	Filed Defts Stip & Order that depositions of pltffs now scheduled for 11/29,30 & 12/72 is adjourned to 1/3,4&5,73 at same time and place.	
Jan.8,73	Filed Pltff's Stipulation extending time to answer from 1/5,6&7,1973 adjourned to 2/2,5&6,73.So Ordered. Pierce, J.	
Jan.19,73	Filed Stip of Defts Milton A.Speicher,Francis I.duPont&Co,F.I.duPont,Glore Forgan & Co., re:re depositions of pltffs now scheduled for 2/2,5 and 6 are adjounted to 2/26,27 and 28,1973.So Ordered.Pierce, J.	
Feb.28,73	Filed Defts.Milton A.Speicher,Francis I.duPont&Co.,FI DuPont&Glore Forgan & Co. Stip & Order scheduled for 2/26/27&28,1973 are adjourned to 3/26/27&28,1973.	
Mar.6,73	Filed Defts Milton A.Specicher,Francis I.duPont& Co.,F.I.duPont,Glore Forgan&Co. Stip & Order extending time to answer from 3/26,27&28,73 adjourned to 4/23,24 and 25,73 re:depositions. So Ordered,Carter,J.	
Jun27-73	Filed Stip and Order that the depositions of the pltffs now scheduled for June 4,5,6 1973and that defts Milton A. Speicher,Francis I. duPont and Co. and FI duPont,Glore Forgan & Co. shall retain priority of discovery and shall be entitled to conduct the firs depositions of pltffs Hirsch,Kohns and Mundheim. CARTER,J.	
-73	Filed stip. and order that depositions of pltfs. now ret. 4/23/73 etc, be adj. to 6/4/73.,etc. Pierce, J.	
5-23-73	Filed Notice of Change of Firm name for Cahill,Gordon and Reindel.	
/-25-73	Filed stip. and order that the depositions of pltfs. now scheduled for July 9,10, and 11,1973 are adj. to Sept. 10,11,12,1973 same time and place;the defts.Milton A.Speicher, Francis I. DuPont Glore Forgan and Co. shall retain their priority of discovery and shall be entitled to conduct first depositions of pltf,Hirsch,Kohns and Mundheim.So ordered,Carter, J.	
pt. 19-73	Filed stip. and order that thedepositions of the pltf. now scheduled for Sept. 10,11 and 12,1973 are adj. to Oct. 15,16 and 17,1973;defts. Milton A. Speicher, Francis I. dupont and Co.and F. I. dupont glore forgan and Co.,shall retain their priority of discovery and shall be entitled to conduct the first depositions of pltfs. Hirsch,Kohns and Mundheim,So ordered, Carter, J.	
ep.26,73	Filed Notice of Change of Firm Name to Rogers &Wells inplace of Royall Koegel etc.	
ct-26-73	Filed Stipulation and Order Adjourning Depositions dates to 11/12, 13, and 14,1973 So ordered, Carter, J.	
Nov-13-73	Filed stip. and order adj. deposition of pltff. to Dec-17-73. The defendants and plaintiffs are to proceed with pre-trial discovery -- Carter, J.	
Dec-26-73	Filed stip. and order that the depositions of the plaintiffs now scheduled for Dec-17, 18 and 19, 1973 are adj. to Jan-7, 8 and 9, 1974 at the same time and place -- Carter, J.	
-1-74	PRE-TRIAL CONFERENCE HELD BY Carter J.	
or- 3-74	Filed deft. Stock Exchange's request of pltf. Kohns for production of documents - first set.	
or- 3-74	Filed deft. Stock Exchange's request of pltf. Hirsch for production of documents - first set.	
4-8-74	Filed deft. Stock Exchange's request of pltf. Mundheim for production of documents - first set.	
pr- 5-74	Filed plaintiff's request for production	
Apr-15-74	Filed deft. N.Y. Stock Exchange's notice to take depositions of Robert J. Fraiman on 4-24-74. - issued subp.	
pr-23-74	Filed plaintiffs interrog. to deft. N.Y. Stock Exchange.	

— over —

~~Leesco Data Processing Equipment Corp. v. Robert Maxwell~~

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~~Judge Carter~~

JUDGE CARTER

DATE	PROCEEDINGS	Date Order Judgment N
May 1-74	Filed deft. N.Y. Stock Exchange Inc.'s notice to take depositions of Edward First on 5-10-74 - subp. issued.	
May 1-74	Filed deft. N.Y. Stock Exchange Inc.'s notice to take depositions James J. Fuld on 5-9-74 - subp. issued.	
May 2-74	Filed deft. Haskin & Sells Interrogatories to pltf.	
May 2-74	Filed response of pltf. Howard C. Hirsch to deft. N.Y. Stock Exchange's request for production of documents	
May 2-74	Filed response of pltf. Marshall S. Mundheim to deft. N.Y. Stock Exchange's request for production of documents	
May 2-74	Filed response of pltf. Paul L. Kohns to deft. N.Y. Stock Exchange's request for production of documents.	
May- 7-74	Filed pltf's notice to take depositions of defendant Haskin and Sells on 5-24-74	
May- 7-74	Filed plaintiffs notice to take depositions of deft. NY Stock Exchange on 5-17-74	
May- 7-74	Filed deft. N.Y. Stock Exchange's notice to take depositions of Alexander Norman on 5-16-74 - subp. issued.	
May- 9-74	Filed pltf's notice to take depositions of Lee D. Arning on 5-28-74	
May-15-74	Filed deft. Haskins and Sells notice to take depositions of Frank Gariboldi on 5-29-74	
May 21-74	Filed for Deft. Haskins & Sells - Notice of Deposition of Thomas Weil on May 29, 1974 at	
May-29-74	Filed consent order that the time of the parties to complete discovery is ext. to June 30, 1974 -- Carter, J.	
May-29-74	Filed consent order that the amended complaint be dismissed with respect to defendants duPont Glore Foreign Inc., F.I. duPont, Glire Foreign & Co., Francis I. duPont & Co., Milton A. Speicher, Wallace C. Latour and Edmond duPont with prejudice and without costs. Ordered that nothing in this action shall prejudice the rights of any defendant with respect to the cross-claims which have been asserted in this action. -- Carter, J.	
May-29-74	Filed answer of deft. N.Y. Stock Exchange to pltf's interrog.	
May-29-74	Filed deft. Exchange's objections to pltf's interrog.	
June 14-74	Filed for deft. N.Y. Stock Exchange Notice of Deposition of James Fuld dtd 6/25/74	
Jun- 5-74	Filed pltf's notice to take deposotions of Edmund duPont on 6-17-74	
Jun- 5-74	Filed pltf's notice to take depositions of Milton A. Speicher on 6-18-74. - issued subp.	
02-14-75	Filed by defts Haskins & Sells and the Exchange affdvt., statement under Rule 9(g and notice of motion for summary judgment - ret. 2-28-75	
02-14-75	Filed by defts Haskins, et. al. memorandum in support of above motion for summary judgment.	
02-26-75	Filed stip. and order adj. deft. Haskins & Sells motion for summary judgment to to 4-4-75 and that pltf's answering papers will be served by 3-21-75 --	
02-26-75	Filed stip. and order adj. deft.'s motion to dismiss to 4-10-75 -- Werker, J.	
3-19-75	Action reassigned to Judge Bonsal m/n	
3-27-75	Filed notice of reassignment to Judge Carter. m/n	
03-27-75	Filed stip. and order adj. deft's motion for summary judgment to 4-11-75 - answering papers to be filed by 3-28-75 -- Carter, J.	
03-04-75	Filed memorandum of pltfs Paul L. Kohns and Marshall S. Mundheim in opposition to the motion of defts Haskins & Sells and the NY Stock Exchange, Inc. for summary judgment.	
03-04-75	Filed pltf. Paul L. Kohns affdvt. in opposition to the motion of deft. N.Y. Stock Exchange for summary judgment.	
03-07-75	Filed statements of plaintiffs Paul L. Kohns and Marshall S. Mundheim pursuant to R le 9(h)	
03-04-75	Filed pltf. Mundheim's affdvt. in opposition to mot. for summary judgment.	

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Hirsch v. DuPont et.al.

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DATE	PROCEEDINGS
04-04-75	Filed plaintiffs affdvt. of Sheldon D. Camby in opposition to defts' motion for summary judgment.
04-11-75	Filed reply memorandum of deft. Haskins & Sells and deft. NY Stock Exchange.
04-12-75	Filed deft. (Haskins and Sells) affdvt. and notice of motion for reargument of this court's decision dated June 4, 1975, etc.ret. on date to be fixed by court. (NY Stoc Exchange)
06-12-75	Filed deft. (Haskins a d Sells) memorandum in support of motion for reargument.
06-09-75	Filed OPINION # 42557--Defts. NYStock Exchange and Haskins and Sells made motions for summary judgment dismissing Kohns and Mundheims claims under 10(b) of the Exchange Act and 17(a) of the Securities Act. The motion is granted solely with respect to Kohns and Mundheims general partnership interests in Dupont Glore. Defts. motions for summary judgment dismissing pltfs. claims are denied with respect to pltfs. ltd. partnership interests. Defts. motions are denied as to Kohns and Mundheims pendent state law claims, etc. as indicated. Soordered, Carter, J. m/n
06-11-75	Filed stip. and order that the cross claims of defts. NYSE and Haskins and Sells against deft. Dupont, Glore Morgan and chte cross claims of deft. DGF against defts NYSE and H&S are dismissed without costs; in the event tha a judgment is renedered in favor of pltfs, the NYSE and or H&S shalll have right to reassert crossclaims, etc. as indicated. So ordered, Carter, J.
06-13-75	Filed stip. and order that the crossclaims of defts. Edumond Dupont, dupont Glore For Inc, Francis I. dupont and co., FIdupont, Glore Forgan andCo and Milton speichle4 are dismissed with prej. and without costs, etc. as indicated Soordered, Carter, J.
06-25-75	Filed consent pre-trial order -- Carter, J.
06-18-75	Filed deft. N.Y.Stock Exchange's memorandum in opposition to pltf's amending complaint at trial.
06-18-75	Filed deposition of Robert Fraiman on 5-1-74 m/n
06-18-75	Filed deposition of James J. Fuld on 6-14-74 m/n
06-18-75	Filed pltf s affdvt. of Sheldon D. Camby in support of pltf's application to introduce proof
06-18-75	Filed plaintiffs' pre-marked exhibits.
06-18-75	Filed pltf's answers to interrog. of defts Haskin & Sells.
06-19-75	Filed deft. Haskins & Sells affdvt. of David R. Hyde in opposition to pltf's appl. to file 2nd amended complaint.
07-08-75	Filed stip. and order that the entry of judgment pursuant to order of this Court (Op. #42557) which is not deemed a final order for purposes of appeal, be delayed until, and merged into, the entry of final judgment As to all claims of all parties in this action to be rendered after trial. -- Carter, J.
06-17-75	NON-JURY TRIAL BEGUN before Carter, J.
06-18-75	trial continued.
06-19-75	trial continued
06-20-75	trial continued
06-23-75	trial continued
06-24-75	trial continued
06-30-75	trial continued and concluded. Decision reserved. -- Carter, J.
07-21-75	Filed deft's affdvt. of Grant B. Hering in connection with O.S.C. of 6-5-75
07-21-75	Filed deft. Haskins & S.'s affdvt. of David R. Hyde in opposition to O.S.C.
07-21-75	Filed by defts. Speicher et.al. affdvt. and O.S.C. (dated 6-5-75) to server defts and for a separate trial. - ret. 6-9-75 - Carter, J.
07-21-75	Filed OPINION #4282[illegible]...The defendants have not sustained their burden of showing their entitlement to any contribution. In addition as to H&S conceivably liabilit to the plaintiffs could be found to exist based on Petrillos representations, and as has been indicated no responsibility for those representations has been traced to duPont or any other of its partners. Under the circumstances, this is

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DATE	PROCEEDINGS
07-21-75	continued from page 7
	a case where prior to determination of the liability of NYSE and H&S to plaintiffs, the formers' cross-claims must be dismissed as not proved. The case-in-chief has been submitted but has not yet been decided. Therefore the court will refrain from directing entry of judgment under Rule 54(b) as to any part of the case until the whole case is disposed of. It is so ordered. - Carter, J. m/n
07-21-75	Filed Transcript of record of proceedings, dated June 30, 1975
07-16-75	Filed Transcript of record of proceedings, dated June 17, 1975
07-16-75	Filed Transcript of record of proceedings, dated June 20, 1975
09-26-75	Filed stip. and order ext. time for parties to file original post trial memoranda to 10-6-75 with reply memoranda to be served by 10-16-75 -- Carter, J.
10-08-75	Filed post trial memorandum of deft. Haskins & Sells.
10-08-75	Filed deft. N.Y. Stock Exchange s post trial memorandum.
10-08-75	Filed pltfs' post trial memorandum.
10-22-75	Filed deft. N.Y. Stock Exchange's post trial reply memorandum.
10-30-75	Filed stip. and order ext. time of attorneys for pltf. to submit post trial reply to 10-31-75 5 PM -- Carter, J.
10-03-75	Filed plaintiffs' post trial reply memorandum.
12-05-75	Filed Pltff's Supplemental Post-Trial Memorandum. (Ltr to Judge)
12-12-75	Filed Deft NY Stock Exchange's reply to Pltff's Post-Trial Memorandum.
01-05-76	Filed Notice of Change of Name from Pollack & singer to Pollack & Kaminsky.
7-6-76	Fld Opinion#44,715....Accordingly, the complt is dismissed and judgment is awarded to NYSE and H&S, and all X-claims are dismissed. Settle Order...Carter,J. mn
7-6-76	Fld Def...(New York Stock Exchange, Inc. and Haskins & Sells) Memo in support of the Proposed comprehensive Order and Judgment.
8-3-76	Fld Order & Judgment that the amend complt is dismissed on the merits and w/prej as to defts NY Stock Exc and Haskin & Sells and that the contingent x-claims for indemnification and contribution of defts NY Stock Exc and Haskins & Sell vs deft E. duPont, F.I. duPont, G. Forgan & Co. and duPont Colre Forgan Inc are dismissed with prej. and that defts NY Stock Exc recover their costs in this action to be taxed vs pltffs by Clerk...etc.....Carter,J. Judgment Ent 8-3-76-Clerk mn
8-19-76	Fld Bill of Cost as taxed in the sum of $2,506.77., in favor of deft Francis I.Dupont & Co.,F.K. DuPont Glove Forgan & Co.,and Milton Speicher as against NY Stock Exc., and Haskins & Sells and added to the judgment-Clerk--Docketed as Judgment#76,778. mn
8-19-76	Filed Bill ofCosts as taxed in the sum of $5,211.08., in favor of deft Haskins & Sells, as against all pltffs, and added thm to thejudgment. No Appearnace in opposition--Clerk. Docketed as Judgment #76,778. mn
8-19-76	Fld Bill of Costs as taxed in the sum of $6,822.18.,in favor of deft NY Stock Exc., as against all pltffs, and added to the judgment-No appearance in opposition-Clerk ---Docket as Judgt#76,778. mn
9-1-76	Filed pltffs notice of appeal to the USCA from judgment & order ent. 8-3-76, as dismisses the amended complt from order ent. 6-5-75 incorporated within the aforesaid judgment in accordance with the provisions of Rule 54(b). Copies sent To:
	Milbank Tweed Hadley & McCloy One Chase Manhattan Plaza New York, N.Y. 10007
	Cahill Gordon & Reindel 80 Pine Street New York, N.Y. 10005
	Rogers & Wells 200 Park Avenue New York, N.Y. 10017
	Weil Gorshal & Manges 767 Fifth Avenue New York, N.Y. 10022

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CARTER

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DATE	PROCEEDINGS
	Cadwalader Wickersham & Taft — Pollack & Kaminsky
	One Wall Street — 61 Broadway
	New York, N.Y. 10005 — New York, N.Y. 10006
2-27-76	[redacted] tran[redacted] ~~of proceedings~~, dated 6-23-75 & 6-24-75
-22	Filed affdvt of Sheldon Canby in support of motion
10-22-75	Filed post-trial reply memorandum of deft Haskins and Sells
9-30-76	FILED CERTIFICATION TO USCA on 9-30-76

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM, Plaintiffs, -against- EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC., Defendants.	1972 Civil Action No. COMPLAINT

Plaintiffs, by their attorneys, Shea Gould Climenko & Kramer, allege as follows:

ALLEGATIONS COMMON TO BOTH CLAIMS

1. Jurisdiction of this action is based upon the Securities Exchange Act of 1934, 15 USC §78(a) et seq., the Securities Act of 1933, 15 USC §77(a) et seq. and the doctrine of pendent jurisdiction. The amount in controversy exceeds the sum or value of $10,000 exclusive of interest and costs.

2. The acts and transactions complained of herein were accomplished through the use of and by means of interstate commerce, including the mails and telephones.

3. Beginning some time in 1969 and continuing until July 1970, Francis I. duPont & Co. was a limited partnership

created under the laws of the State of New York, a member of the New York Stock Exchange and other principal securities exchanges and engaged in business as a broker-dealer in securities in the State of New York and in interstate commerce.

4. Beginning in July 1970 and continuing to the date hereof, F. I. duPont, Glore Forgan & Co. was and is a limited partnership created under the laws of the State of New York which succeeded to the assets and liabilities and business of Francis I. duPont & Co. and it conducted that business until May 1971.

5. Defendant duPont Glore Forgan Incorporated is a corporation organized and existing under the laws of the State of Delaware which acquired the assets and business of F. I. duPont, Glore Forgan & Co. on or about May 14, 1971, and has assumed and is responsible for the liabilities of Francis I. duPont & Co. and F. I. duPont, Glore Forgan & Co., including but not limited to, the liabilities of the said partnerships arising by reason of the matters set forth in this complaint.

6. Defendants Edmond duPont, Milton A. Speicher and Wallace C. Latour were general partners of Francis I. duPont & Co. and F. I. duPont, Glore Forgan & Co.

7. Defendant Haskins and Sells was, at the times hereinafter mentioned, and is a partnership engaged in the profession of accountancy as certified public accountants.

8. Defendant New York Stock Exchange, Inc. was, at the times hereinafter mentioned, and is a corporation organized under the laws of the State of New York.

FOR A FIRST CLAIM BY ALL PLAINTIFFS
AGAINST ALL DEFENDANTS

9. Prior to July 1970, plaintiffs were partners in Hirsch & Co., a member firm of the New York Stock Exchange and other principal securities exchanges.

10. On or about July 2, 1970, as a result of negotiations between partners of Hirsch & Co. and the individual defendants, defendant Francis I. duPont & Co. and discussions between any of the foregoing persons and defendants Haskins and Sells and New York Stock Exchange, Inc., held prior thereto and pursuant to written agreements made at or about that date, Hirsch & Co. was liquidated and its assets and business was transferred to defendant Francis I. duPont & Co. and thereupon to defendant F. I. duPont, Glore Forgan & Co.

11. In or about July 1970, as part of the transaction described hereinabove in paragraph "10", Francis I. duPont & Co. and F. I. duPont, Glore Forgan & Co. offered for sale to and sold to and issued to the plaintiffs herein certain securities consisting of general and limited partnership capital units of F. I. duPont, Glore Forgan & Co.

Name	Voting	Non Voting	Amount Paid Therefor
Howard C. Hirsch	0	0	$400,000
Paul L. Kohns	35	272	$900,000
Marshall S. Mundheim	33	274	$900,000

12. In connection with the transaction hereinabove alleged in paragraphs "10" and "11" and in order to induce plaintiffs to purchase the said capital units and enter into the transaction for the sale of Hirsch & Co. assets, Francis I. duPont and F. I. duPont, Glore Forgan & Co. and the individual defendants knowingly made untrue statements of material facts with respect to the financial condition, business and operations of Francis I. duPont & Co. and F. I. duPont, Glore Forgan & Co. and knowingly omitted to state material facts necessary to make the statements made, in the light of the circumstances in which they were made, not misleading.

13. Without limiting the generality of the foregoing, the following were certain of the said misrepresentations:

(a) Said defendants represented that Francis I. duPont & Co. was lawfully engaged in business when in fact the said partnership was then in violation of capital compliance and other rules of the New York Stock Exchange and of the Securities Exchange Act and should, in accordance with the rules and Act, have been suspended from further business activity.

(b) Said defendants represented that Francis I. duPont & Co. had a substantial net worth when in fact the net worth of Francis I. duPont & Co. was substantially less than represented.

(c) Said defendants failed to disclose tens of millions of dollars of account differences reflected in the records of Francis I. duPont & Co. concerning missing securities, uncollected dividends owing to customers, interest, bad debts and other similar items for which no adequate reserves had been created and the net effect of which was to virtually or totally eliminate any net worth in the said partnership.

(d) Said defendants failed to disclose that the financial statements, audited and unaudited, theretofore issued by Francis I. duPont & Co. in 1969 and 1970 were untrue and incorrect and unreliable in respect of the matters referred to in subparagraphs "(b)", "(c)", "(e)" and "(f)" of this paragraph "13".

(e) Said defendants failed to disclose that Francis I. duPont & Co. was then in violation of the rules of the New York Stock Exchange regarding capital.

(f) Said defendants failed to disclose that Francis I. duPont & Co. had a "back office" problem affecting its financial and clerical operations which rendered it virtually unable to continue in business and that record keeping

errors, discrepancies, irreconcilable accounts, missing securities and customer complaints dating back several years had mounted to the point of substantially disabling operation of the business and that this condition continued during the spring and summer of 1970 and was not under control.

(g) Said defendants failed to fully disclose the inordinate size and extent of the liability of Francis I. duPont & Co. to others in respect of "fails".

(h) Said defendants represented that Francis I. duPont & Co. and F. I. duPont, Glore Forgan & Co. then had substantial sources of additional capital readily available when in fact no such sources were so available.

(i) Said defendants failed to disclose that Francis I. duPont & Co. had accounts which were under-margined to the extent of several million dollars and that certain of its customers' securities had been improperly hypothecated to secure firm loans.

(j) Said defendants represented that they believed that certain accounting statements of Francis I. duPont & Co. dated April 30, 1970 fairly represented the condition of the business of Francis I. duPont & Co. when said defendants knew that said accounting statements were utterly unreliable by reason of the matters hereinabove set forth.

14. During the period January 1970 through November

1971, defendant Haskins and Sells acted as auditors to Hirsch & Co. as well as to Francis I. duPont & Co. and F. I. duPont, Glore Forgan & Co.

15. During 1969 and 1970, defendant F. I. duPont & Co. and defendant Haskins and Sells issued, prepared, certified or circulated certain financial statements of Francis I. duPont & Co. On or before July 1, 1970, defendant Haskins and Sells knew or should have known that these financial statements would be relied on and were being relied upon by plaintiffs in connection with the transactions hereinabove referred to in paragraphs "10", "11" and "12".

16. On or before July 1, 1970, defendant Haskins and Sells knew or had reason to know that said financial statements of Francis I. duPont & Co. theretofore issued, prepared, certified or circulated by F. I. duPont & Co. or by Haskins and Sells were false in respect of the matters hereinabove set forth in paragraph "13" and defendant Haskins and Sells was under an obligation to recall or correct such statements and/or to advise and warn Hirsch & Co. and the plaintiffs with respect thereto.

17. At or prior to July 1, 1970, defendant New York Stock Exchange, Inc. knew or had reason to know the truth with respect to the matters hereinabove set forth in paragraph "13" but did not disclose this information to Hirsch & Co. or to plaintiffs. Defendant New York Stock Exchange, Inc. failed to warn and advise against the transaction but expressly encouraged

and approved the transaction by which Francis I. duPont & Co. acquired the Hirsch & Co. business, and plaintiffs became partners in F. I. duPont, Glore Forgan & Co. because the said New York Stock Exchange feared that if the said transaction was not consummated and the Hirsch capital and business not infused into Francis I. duPont & Co., the said Francis I. duPont & Co. would fail and thereby possibly cause the failure of other Stock Exchange member firms with consequent widespread loss of public confidence in the Exchange.

18. As a result of the matters aforesaid, plaintiffs purchased the said capital units of F. I. duPont, Glore Forgan & Co. which capital units were worth substantially less than the value given therefor and plaintiffs suffered substantial damage.

FOR A SECOND CLAIM BY ALL PLAINTIFFS AGAINST THE INDIVIDUAL DEFENDANTS, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO. AND duPONT GLORE FORGAN INCORPORATED

19. Plaintiffs repeat and reallege each of the allegations hereinabove set forth in paragraphs "1", "3", "4", "5", "6", "9", "10" and "11" with the same force and effect as if set forth at length herein.

20. The said transaction was reflected in a written agreement between plaintiffs, the individual defendants and F. I. duPont & Co. dated July 2, 1970, which agreement contained the following representations:

"2. Representation of duPont. duPont represents and warrants that:

"(a) Organization and Existence. duPont is and on the Closing Date will be a limited partnership duly organized and validly existing under the laws of the State of New York, with full power and authority to transact the business in which it is engaged."

* * * *

"(c) Balance Sheet. A balance sheet of duPont as of April 30, 1970 which has been delivered to Hirsch is believed fairly to reflect the financial condition of duPont as of such date determined in accordance with generally accepted accounting principles."

21. The foregoing representations were false and the defendants stand in breach of the warranties therein set forth.

22. By reason of the breach of the contractual representations and warranties aforesaid, plaintiffs have suffered substantial damage.

WHEREFORE, plaintiffs demand judgment against the defendants in such amount as the Court determines after trial as their damages by reason of the frauds, statutory violations and breaches of contract hereinabove set forth.

Dated: February 18, 1972.

SHEA GOULD CLIMENKO & KRAMER

By _____

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM, Plaintiffs, -against- EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC., Defendants.	Civil Action No. 72 Civ. 775 AMENDED COMPLAINT

Plaintiffs, by their attorneys, Shea Gould Climenko & Kramer, allege as follows:

ALLEGATIONS COMMON TO BOTH CLAIMS

1. Jurisdiction of this action is based upon §27 of the Securities Exchange Act of 1934, 15 USC §78aa, §22 of the Securities Act of 1933, 15 USC §77v and the doctrine of pendent jurisdiction. The amount in controversy exceeds the sum or value of $10,000 exclusive of interest and costs.

2. The acts and transactions complained of herein were accomplished through the use of and by means of interstate commerce, including the mails and telephones, and violate §10b of the Securities Exchange Act of 1934 (15 USC §78j), the rules and regulations of the Securities and Exchange Commission promulgated thereunder, §17 of the Securities Act of 1933 (15 USC §77q), and applicable common law principles of fraud, intentional and negligent misrepresentation, and breach of fiduciary duty.

3. Beginning some time in 1969 and continuing until July 1970, Francis I. duPont & Co. was a limited partnership created under the laws of the State of New York, a member of the New York Stock Exchange and other principal securities exchanges and engaged in business as a broker-dealer in securities in the State of New York and in interstate commerce.

4. Beginning in July 1970 and continuing to the date hereof, F. I. duPont, Glore Forgan & Co. was and is a limited partnership created under the laws of the State of New York which succeeded to the assets and liabilities and business of Francis I. duPont & Co. and it conducted that business until May 1971.

5. Defendant duPont Glore Forgan Incorporated is a corporation organized and existing under the laws of the State of Delaware which acquired the assets and business of F. I. duPont, Glore Forgan & Co. on or about May 14, 1971, and has assumed and is responsible for the liabilities of Francis I. duPont & Co. and F. I. duPont, Glore Forgan & Co., including but not limited to, the liabilities of the said partnerships arising by reason of the matters set forth in this complaint.

6. Defendants Edmond duPont, Milton A. Speicher and Wallace C. Latour were general partners of Francis I. duPont & Co. and F. I. duPont, Glore Forgan & Co.

7. Defendant Haskins and Sells was, at the times hereinafter mentioned, and is a partnership engaged in the profession of accountancy as certified public accountants.

8. Defendant New York Stock Exchange, Inc. was, at the times hereinafter mentioned, and is a corporation organized under the laws of the State of New York.

FOR A FIRST CLAIM BY ALL PLAINTIFFS
AGAINST ALL DEFENDANTS

9. Prior to July 1970, plaintiffs were partners in Hirsch & Co., a member firm of the New York Stock Exchange and other principal securities exchanges.

10. On or about July 2, 1970, as a result of negotiations between partners of Hirsch & Co. and the individual defendants, defendant Francis I. duPont & Co. and discussions between any of the foregoing persons and defendants Haskins and Sells and New York Stock Exchange, Inc., held prior thereto and pursuant to written agreements made at or about that date, Hirsch & Co. was liquidated and its assets and business was transferred to defendant Francis I. duPont & Co. and thereupon to defendant F. I. duPont, Glore Forgan & Co.

11. In or about July 1970, as part of the transaction described hereinabove in paragraph "10", Francis I. duPont & Co. and F. I. duPont, Glore Forgan & Co. offered for sale to and sold to and issued to the plaintiffs herein certain securities consisting of general and limited partnership capital units of F. I. duPont, Glore Forgan & Co.

Name	Voting	Non Voting	Amount Paid Therefor
Howard C. Hirsch	0	0	$400,000
Paul L. Kohns	35	272	$900,000
Marshall S. Mundheim	33	274	$900,000

12. In connection with the transaction hereinabove alleged in paragraphs "10" and "11" and in order to induce plaintiffs to purchase the said capital units and enter into the transaction for the sale of Hirsch & Co. assets, Francis I. duPont and F. I. duPont, Glore Forgan & Co. and the individual defendants knowingly made untrue statements of material facts with respect to the financial condition, business and operations of Francis I. duPont & Co. and F. I. duPont, Glore Forgan & Co. and knowingly omitted to state material facts necessary to make the statements made, in the light of the circumstances in which they were made, not misleading.

13. Without limiting the generality of the foregoing, the following were certain of the said misrepresentations:

(a) Said defendants represented that Francis I. duPont & Co. was lawfully engaged in business when in fact the said partnership was then in violation of capital compliance and other rules of the New York Stock Exchange and of the Securities Exchange Act and should, in accordance with the rules and Act, have been suspended from further business activity.

(b) Said defendants represented that Francis I. duPont & Co. had a substantial net worth when in fact the net worth of Francis I. duPont & Co. was substantially less than represented.

(c) Said defendants failed to disclose tens of millions of dollars of account differences reflected in the records of Francis I. duPont & Co. concerning missing securities, uncollected dividends owing to customers, interest, bad debts and other similar items for which no adequate reserves had been created and the net effect of which was to virtually or totally eliminate any net worth in the said partnership.

(d) Said defendants failed to disclose that the financial statements, audited and unaudited, theretofore issued by Francis I. duPont & Co. in 1969 and 1970 were untrue and incorrect and unreliable in respect of the matters referred to in subparagraphs "(b)", "(c)", "(e)" and "(f)" of this paragraph "13".

(e) Said defendants failed to disclose that Francis I. duPont & Co. was then in violation of the rules of the New York Stock Exchange regarding capital.

(f) Said defendants failed to disclose that Francis I. duPont & Co. had a "back office" problem affecting its financial and clerical operations which rendered it virtually unable to continue in business and that record keeping

errors, discrepancies, irreconcilable accounts, missing securities and customer complaints dating back several years had mounted to the point of substantially disabling operation of the business and that this condition continued during the spring and summer of 1970 and was not under control.

(g) Said defendants failed to fully disclose the inordinate size and extent of the liability of Francis I. duPont & Co. to others in respect of "fails".

(h) Said defendants represented that Francis I. duPont & Co. and F. I. duPont, Glore Forgan & Co. then had substantial sources of additional capital readily available when in fact no such sources were so available.

(i) Said defendants failed to disclose that Francis I. duPont & Co. had accounts which were under-margined to the extent of several million dollars and that certain of its customers' securities had been improperly hypothecated to secure firm loans.

(j) Said defendants represented that they believed that certain accounting statements of Francis I. duPont & Co. dated April 30, 1970 fairly represented the condition of the business of Francis I. duPont & Co. when said defendants knew that said accounting statements were utterly unreliable by reason of the matters hereinabove set forth.

14. During the period January 1970 through November

1971, defendant Haskins and Sells acted as auditors to Hirsch & Co. as well as to Francis I. duPont & Co. and F. I. duPont, Glore Forgan & Co.

15. During 1969 and 1970, defendant F. I. duPont & Co. and defendant Haskins and Sells issued, prepared, certified or circulated certain financial statements of Francis I. duPont & Co. On or before July 1, 1970, defendant Haskins and Sells knew or should have known that these financial statements would be relied on and were being relied upon by plaintiffs in connection with the transactions hereinabove referred to in paragraphs "10", "11" and "12".

16. On or before July 1, 1970, defendant Haskins and Sells knew or had reason to know that said financial statements of Francis I. duPont & Co. theretofore issued, prepared, certified or circulated by F. I. duPont & Co. or by Haskins and Sells were false in respect of the matters hereinabove set forth in paragraph "13" and defendant Haskins and Sells was under an obligation to recall or correct such statements and/or to advise and warn Hirsch & Co. and the plaintiffs with respect thereto.

17. At or prior to July 1, 1970, defendant New York Stock Exchange, Inc. knew or had reason to know the truth with respect to the matters hereinabove set forth in paragraph "13" but did not disclose this information to Hirsch & Co. or to plaintiffs. Defendant New York Stock Exchange, Inc. failed to warn and advise against the transaction but expressly encouraged

and approved the transaction by which Francis I. duPont & Co. acquired the Hirsch & Co. business, and plaintiffs became partners in F. I. duPont, Glore Forgan & Co. because the said New York Stock Exchange feared that if the said transaction was not consummated and the Hirsch capital and business not infused into Francis I. duPont & Co., the said Francis I. duPont & Co. would fail and thereby possibly cause the failure of other Stock Exchange member firms with consequent widespread loss of public confidence in the Exchange.

18. As a result of the matters aforesaid, plaintiffs purchased the said capital units of F. I. duPont, Glore Forgan & Co. which capital units were worth substantially less than the value given therefor and plaintiffs suffered substantial damage.

FOR A SECOND CLAIM BY ALL PLAINTIFFS AGAINST THE INDIVIDUAL DEFENDANTS, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO. AND duPONT GLORE FORGAN INCORPORATED

19. Plaintiffs repeat and reallege each of the allegations hereinabove set forth in paragraphs "1", "3", "4", "5", "6", "9", "10" and "11" with the same force and effect as if set forth at length herein.

20. The said transaction was reflected in a written agreement between plaintiffs, the individual defendants and F. I. duPont & Co. dated July 2, 1970, which agreement contained the following representations:

"2. Representation of duPont. duPont represents and warrants that:

"(a) Organization and Existence. duPont is and on the Closing Date will be a limited partnership duly organized and validly existing under the laws of the State of New York, with full power and authority to transact the business in which it is engaged."

* * * *

"(c) Balance Sheet. A balance sheet of duPont as of April 30, 1970 which has been delivered to Hirsch is believed fairly to reflect the financial condition of duPont as of such date determined in accordance with generally accepted accounting principles."

21. The foregoing representations were false and the defendants stand in breach of the warranties therein set forth.

22. By reason of the breach of the contractual representations and warranties aforesaid, plaintiffs have suffered substantial damage.

WHEREFORE, plaintiffs demand judgment against the defendants in such amount as the Court determines after trial as their damages by reason of the frauds, statutory violations and breaches of contract hereinabove set forth.

Dated: February 18, 1972.

SHEA GOULD CLIMENKO & KRAMER

By _____

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM,

Plaintiffs,

- against - 72 Civ. 775

EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC.,

Defendants.

- x

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CARTER, District Judge

O P I N I O N

I.

The amended complaint alleges in substance that defendants violated §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and §17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a), in connection with the purchase by plaintiffs and sale by certain defendants of general and limited partnership interests in F. I. duPont, Glore Forgan & Co. Common law claims based on pendent jurisdiction are also asserted. In May, 1974, plaintiffs entered into a settlement with all defendants except the New York Stock Exchange, Inc. ("Exchange") and Haskins and Sells, an accounting firm. The Exchange and Haskins and Sells now move for summary judgment dismissing the federal securities laws claims of plaintiffs Paul L. Kohns and Marshall S. Mundheim, primarily on the ground that the general partnership interests purchased by them [1] were not "securities," as defined in §3(a)(10) of the Exchange Act, 15 U.S.C.

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[1] As more fully set forth below, Kohns and Mundheim also purchased limited partnership interests and other interests.

§78c(a)(10), and §2(1) of the Securities Act, 15 U.S.C. §77b(1). No motion is made with respect to plaintiff Howard C. Hirsch, who received only limited partnership interests.

The Amended Complaint

The amended complaint alleges that prior to July, 1970, plaintiffs were general partners of Hirsch & Co., a brokerage firm; that on or about July 2, 1970, pursuant to written agreement, Hirsch & Co. was liquidated and its assets were transferred to defendant Francis I. duPont & Co. ("duPont") and then to defendant F. I. duPont, Glore Forgan & Co. ("duPont Glore"), a successor partnership to duPont; and that as part of the transaction, duPont and duPont Glore "offered for sale and sold to *** the plaintiffs herein certain securities consisting of general and limited partnership capital units of F. I. duPont, Glore Forgan & Co." It is further alleged that in connection with this transaction, all defendants knowingly made untrue statements and omitted to state material facts concerning duPont's compliance with Exchange capital requirements, its net worth and sources of capital, and its "back office" difficulties and problems with customers' accounts. It is alleged that the Exchange and Zask[illegible]s

and Sells, who were auditors to both Hirsch & Co. and duPont, failed to disclose these matters; that the Exchange expressly approved and encouraged the transaction; and that as a result, plaintiffs purchased the partnership interests for more than they were worth and sustained damages.

Background Facts

On this motion for summary judgment, the following background facts are undisputed. Since the early 1940's, plaintiff Kohns had been the managing general partner at Hirsch & Co., and by 1965, he had become in practical fact, the chief operating officer, with responsibility for all aspects of Hirsch & Co.'s business. Mundheim assisted Kohns in these duties, in addition to having "direct responsibility" for the firm's foreign and commodity business, while plaintiff Howard C. Hirsch, as senior partner, had assumed a less active role as "counselor" to Hirsch & Co. (Kohns Tr. 6-8; Mundheim Tr. 9, 11-13).[2] The general partners of

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[2] The references are to pages of the transcripts of the depositions of the indicated persons.

Hirsch & Co. decided upon the "merger" with duPont and Glore Forgan, Staats, Inc. ("Glore"), the third firm involved in the merger, because they believed that a medium-sized firm such as Hirsch & Co. could not survive in Wall Street. (Mundheim Tr. 45; Kohns Tr. 41-42). Glore would contribute its strong underwriting department to the new firm (Kohns Tr. 99), while Hirsch & Co. would bring in its substantial European business. (Kohns Tr. 128). Hirsch and Mundheim also viewed the merger as a means of reducing their activities or retiring while perpetuating the business of Hirsch & Co. (Hirsch Tr. 49; Mundheim Tr. 47-48; Kohns Tr. 43). For this reason, Mundheim testified, he preserved an option under the agreement with the new firm to withdraw his capital and retire after six months. (Mundheim Tr. 212, 290). Kohns felt quite differently, wishing to remain active in the new firm and "die with his boots on." (Kohns Tr. 43).

On July 2, 1970, the Hirsch & Co. partners entered into an agreement with duPont ("the Agreement"), and Articles of Limited Partnership ("Articles") of the new partnership, duPont Glore, were adopted. Under the Agreement, duPont purchased certain of the assets and assumed certain of the liabilities of Hirsch & Co.

(Agreement, p. 1). In payment for the assets, duPont credited certain Hirsch & Co. assets to the accounts of the former Hirsch partners who became general, limited or "special" [3] partners of duPont and then of duPont Glore, as their respective capital contributions to duPont and duPont Glore. [4] (Agreement §5(a)). On the closing date, Kohns and Mundheim were admitted as general partners of duPont and duPont Glore. (Agreement §6). In the course of these transactions, the plaintiffs' accounts in duPont Glore were credited with the following amounts: [5]

	General Partnership Interests	Limited Partnership Interests
Hirsch	-	$400,000
Kohns	$307,000	$593,000
Mundheim	$307,000	$593,000

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[3] "Special partners" were limited partners who also held positions as employees in duPont Glore. (Article 1st).

[4] The balance of the purchase price was to be paid to the "liquidating committee" of Hirsch & Co.

[5] Affidavit of Sheldon D. Camhy, sworn to April 4, 1975, ¶2.

Kohns and Mundheim's general partnership interests represented 35 and 33 "voting units" respectively, out of a total of 1,365 voting units.

The new firm had 74 general partners and several limited partners, assets of $400 million and total capital funds of $60 million. (Camhy Affidavit, ¶2).

In September, 1970, two months after its formation, the new firm was not in compliance with Exchange capital requirements. As a result of the Exchange's demands, new reserves had to be created, reducing the firm's net worth by $15 million. (Camhy Affidavit, ¶3). Despite a contribution of capital from a group including H. Ross Perot, the financial condition of duPont Glore continued to deteriorate, and in December, 1970, Kohns and Mundheim were told that if they attempted to withdraw their capital the firm would be unable to pay it. Accordingly, Mundheim and Kohns became subordinated lenders of duPont Glore on December 14, 1970, and December 31, 1970, respectively. (Mundheim Tr. 364; Kohns Tr. 4).

Discussion

II.

Summary judgment should be granted where the pleadings, depositions and affidavits filed in the case "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), F.R.Civ.P.; Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962). On this motion, the material facts are undisputed; and the issue of whether, on the basis of those facts, the general partnership interests were "securities" is a question of law which may be resolved by the court on summary judgment. Jennings and Marsh, Securities Regulation, 294 n.a (3d ed. 1972); cf. S.E.C. v. W. J. Howey Co., 328 U.S. 293, 301 (1946) (Frankfurter, J. dissenting).

Defendants' principal contention is that Kohns and Mundheim, as general partners, received and exercised the right to participate actively in the management and control of duPont Glore, and that for this reason, their general partnership interests did not constitute "securities," as that term has been defined in the statutes and decisional law.

Before discussing defendants' contention, it would be well to consider the argument that the nature of Kohns and Mundheim's participation after July 2 in duPont Glore, the successor partnership, is immaterial since the fraud was allegedly perpetrated before plaintiffs became general partners in order to induce them to purchase their interests, and the misrepresentations concerned the financial condition of duPont, one of the predecessor partnerships. With respect to plaintiffs' general partnership interests, [6] I deem these considerations irrelevant to the analysis that must be made under §§10(b) and 17(a). Section 10(b) prohibits fraud only if it is "in connection with the purchase or sale of any security *** ." Section 17(a) prohibits fraud only if it is "in the offer or sale of any securities *** ." The Agreement and affidavits clearly show that the individual plaintiffs' only participation in the July 2 transaction was as purchasers of general and limited partnership

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[6] As stated below, these considerations are relevant to the issue of whether the fact that plaintiffs were general partners deprived their limited partnership interests of their character as securities.

interests.[7] Thus in order to recover under §10(b) or §17(a), Kohns and Mundheim must establish that those interests were "securities." As the discussion below indicates, that issue turns on the nature of the investor's participation in the enterprise after he purchases his interest. S.E.C. v. W. J. Howey Co., supra, 328 U.S. at 198-99. In every case in which plaintiff purchases an interest in an enterprise for the first time, he obviously has no participation before the purchase. But in none of the cases cited below is it suggested that that fact is relevant to the issue of whether the interest purchased is a security.

Since the general partnership interests were not conventional securities such as shares of corporate stock, it must be determined whether they constituted "investment contracts" within the meaning of §2(1) of the 1933 Act and §3(a)(10) of the 1934 Act.[8] The classic definition of an "investment

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[7] The Agreement refers to purchases of interests in duPont, but at the same time plaintiffs purchased their interests, duPont became duPont Glore. Plaintiffs stated that they "invested monies in F.I. duPont Glore Forgan & Co." (Kohns Affidavit, ¶2) not in duPont.

[8] The definitions in the two acts are "virtually identical," Tcherepnin v. Knight, 389 U.S. 332, 336 (1967), and authorities construing one definition are apposite to the construction of the other.

contract" is given in S.E.C. v. W. J. Howey Co., supra, where the United States Supreme Court held that an offering of units of a citrus grove development coupled with a contract whereby the management performed all cultivating and marketing services and remitted the proceeds to the investors constituted an offering of "investment contracts":

> "In other words, an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party * * * ." 328 U.S. at 298-99. (Emphasis added)

One element of this definition has caused considerable controversy. That element is the requirement that the investor rely for profit "solely" on the efforts of others. Some subsequent cases have found this apparently narrow, inflexible requirement to be inconsistent with the Howey opinion's own admonition, 328 U.S. at 299, that its definition "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." See S.E.C. v. Glenn W. Turner Enterprises, Inc., 348 F. Supp. 766, 774 (D. Ore. 1972), aff'd, 474 F. 2d 476 (9th Cir. 1973). Other courts have noted that in some of the state law cases relied on by Howey,

e.g., State v. Gopher Tire & Rubber Co., 146 Minn. 52, 177 N.W. 937 (1920), the investors contributed nominal efforts to the enterprise, and these courts have interpreted Howey not to preclude the finding of a security where the investor is required to perform nominal services or physical labor. S.E.C. v. Koscot Interplanetary, Inc., 497 F. 2d 473, 480 (5th Cir. 1974); J. Long, Partnership, Limited Partnership, and Joint Venture Interests as Securities, 37 Mo. L. Rev. 581, 599 n.73 (1972). The primary concern in this regard has been that if the Howey requirement is interpreted literally, see, e.g., Gallion v. Alabama Market Centers, Inc., 282 Ala. 679, 213 So. 2d 841 (1968); Georgia Market Centers, Inc. v. Fortson, 225 Ga. 854, 171 S.E. 2d 620 (1969) (requirement that investors hand out "purchase authority" cards to potential customers in order to earn commissions precluded finding of security), [9] the test could easily be evaded

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[9] There has been a fruitful exchange on the issue of the definition of a security between state courts interpreting blue sky laws and federal courts interpreting the federal statutes. See SEC v. Glenn W. Turner Enterprises, Inc., supra, 348 F. Supp. at 773.

The definition of "security" in most of the blue sky laws is similar to that in §§2(1) and 3(a)(10). Long, Partnership Interests as Securities, supra, at 584 n.15. Although the blue sky decisions are by no means controlling, their analyses may shed light on our problem.

by requiring the investor to contribute a modicum of effort. Lino v. City Investing Co., 487 F. 2d 689, 692-93 (3d Cir. 1973); S.E.C. v. Glenn W. Turner Enterprises, Inc., supra, 474 F. 2d at 482; see Scholarship Counselors, Inc. v. Waddle, 3 CCH Blue Sky L. Rep. ¶71,105 (Ct. App. Ky. 1974); State of Utah v. Dare to Be Great, Inc., 3 CCH Blue Sky L. Reporter ¶71,096 (Dist. Ct. Utah 1972) (questioning whether Howey would have been decided differently if the contract had required the investor "to appear once a year to pull weeds along his row of trees.")

Finally, some courts have stated that the reason Howey excluded the investor who participates in the enterprise from the protection of the disclosure and fraud provisions of the securities laws is that an investor does not need such protection where he obtains a degree of managerial control which affords access to information about the issuer. Polikoff v. Levy, 55 Ill. App. 2d 229, 204 N.E. 2d 807, cert. denied, 382 U.S. 903 (1965); In the Matter of Continental Marketing Associates, Inc., 3 CCH Blue Sky L. Rep. ¶71,016 (Ind. Sec. Comm'n 1969). The fact that the investor performs nominal services or physical labor gives him no access whatever to information about the issuer and affords no reason for depriving him of the protection of the securities laws.

For all of these reasons, the SEC,[10] state securities commissions,[11] and many state[12] and lower federal courts have refused to apply Howey literally. It has also been suggested, erroneously in my opinion, that the Supreme Court has, sub silentio, abandoned the Howey test. See S.E.C. v. Koscot Interplanetary, Inc., supra, 497 F. 2d at 481.[13]

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[10] Sec. Act Rel. 4877, CCH Fed. Sec. L. Rep. ¶77,462 (1967); Sec. Act Rel. 5211, CCH Fed. Sec. L. Rep. ¶78,446 (1971).

[11] In the Matter of Continental Marketing Associates, Inc., supra; Op. of Atty. Gen. of Tenn. No. 27, 3 CCH Blue Sky L. Rep. ¶71,164 (1974).

[12] Scholarship Counselors, Inc. v. Waddle, supra; State of Utah v. Dare to Be Great, Inc., supra.

[13] The court in Koscot, supra, noted that in S.E.C. v. United Benefit Life Insurance Co., 387 U.S. 202, 211 (1967), Mr. Justice Harlan did not cite Howey, but relied instead on S.E.C. v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943), in holding that variable insurance was subject to the registration requirements of the 1933 Act.

The reason for Justice Harlan's failure to cite Howey may have been that the opinion focused primarily on the issue of whether the variable insurance qualified for the "optional annuity" exemption from registration under §3(a)(8) of the Securities Act, 15 U.S.C. §77c(a)(8). The issue of whether the contract was a security was secondary. Joiner lays special emphasis on the issuer's representations. Justice Harlan cited it in support of his conclusion that since issuers of

(Footnote continued)

However, despite the rejection of Howey in other jurisdictions, decisions of this district and circuit until recently[14] followed it and gave no indication that the Howey test would not be applied literally.[15] Glen-Arden Commodities, Inc. v. Costantino,

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(Footnote continued from previous page)

variable insurance represented that their contracts offered much the same opportunity for growth through professionally managed investment as mutual funds, purchasers of variable insurance should be provided with the same disclosure through registration as an investor in a mutual fund.

Any notion that the Supreme Court abandoned Howey in United Benefit is erased by a reading of Tcherepnin v. Knight, supra, decided the following year, where the Court strongly reaffirmed the Howey test.

[14] The dictum in 1050 Tenants Corp. v. Jakobson, 503 F. 2d 1375, 1378 n.5, (2d Cir. 1974), is discussed below.

[15] This circuit has apparently not been faced with the plethora of franchising and get-rich-quick pyramiding schemes which involve nominal efforts by the investor and which have created the pressure for a relaxation of the Howey rule in other circuits. Most of the interests examined by the courts here have been found to be securities even under a literal construction of Howey.

493 F. 2d 1027, 1035 (2d Cir. 1974); Forman v. Community Services, Inc., 500 F. 2d 1246, 1253-54 (2d Cir. 1974), cert. granted, _____ U.S. _____, 95 S. Ct. 801 (1975); Berman v. Orimex Trading, Inc., 291 F. Supp. 701, 702 (S.D.N.Y. 1968) (discretionary trading account); Maheu v. Reynolds & Co., 282 F. Supp. 4 (S.D.N.Y. 1967) (joint commodity account). In Glen-Arden Commodities, Inc. v. Costantino, supra, the Second Circuit said in reference to the Howey definition:

> "This long-term construction placed upon an act of Congress is hardly one that we could disturb even if we wanted to, at this late date." 493 F. 2d at 1035.

Turning to the general partnership interests in the present case, it is clear that a partnership interest may be a security, Pawgan v. Silverstein, 265 F. Supp. 898 (S.D.N.Y. 1967); 1 L. Loss, Securities Regulation, 502 (2d ed. 1961); but, as I understand the law in this circuit, the partnership interest must satisfy the Howey test. New York Stock Exchange, Inc. v. Sloan, CCH Fed. Sec. L. Rep. ¶95,083 (S.D.N.Y. 1975); see also Pawgan v. Silverstein, supra, 265 F. Supp. at 900. In New York Stock Exchange, Inc. v. Sloan, supra, at 97,845, this court (Lasker, J.), applying Howey, adopted a bright-line rule that "general partners are not investors in securities!" The court said that this conclusion

would not vary according to the degree of actual participation by the partner in the firm's affairs, because, under the New York partnership statute, neither his responsibility for the acts of the firm nor his right to a voice in partnership matters could be diminished by his decision to delegate his duties:

> "In our view, however, the determination whether the partnership interest of a general partner is a security does not and should not hinge on the particular degree of responsibility he assumes within the firm. The fact that a partner may choose to delegate his day-to-day managerial responsibilities to a committee does not diminish in the least his legal right to a voice in partnership matters, nor his responsibility under state law for acts of the partnership. See N.Y. Partnership Law §§10, 11, 26. These factors critically distinguish the status of a general partner from that of the purchaser of an investment contract who in law as well as in fact is a 'passive investor'." CCH Fed.Sec.L. Rep. ¶95,083 at 97,845. (Emphasis added.)

I agree in substance with this reasoning, and on the authority of Sloan, hold that the general partnership interests in the present case are not securities. As noted below, this conclusion would be justified if the only evidence before the court on this issue concerned the general partners' participation in duPont Glore by virtue of the voting powers inherent in their general partnership interests. Since Judge Lasker's

opinion in Sloan apparently considers only voting powers, I will confine the present discussion to the voting powers of general partners in duPont Glore, leaving until a later section consideration of the managerial powers exercised by Kohns and Mundheim by virtue of their membership on various committees at duPont Glore.

Before considering the voting powers in the present case, however, it should be noted that Judge Lasker's reasoning in Sloan does not apply to all general partnerships organized under New York law. It is true that under §§40(5) and 98(1), N. Y. Partnership Law, "[a]ll [general] partners have equal rights in the management and conduct of the partnership business *** ." [16] But this right is "subject to any agreement between them." §40, N.Y. Partnership Law; see Doré v. LaPierre, 226 N.Y.S. 2d 949, 953 (Sup. Ct. 1962); Napoli v. Domnitch, 34 Misc. 2d 237, 248, 226 N.Y.S. 2d 908, 915 (Sup. Ct.), modified on other grounds, 18 A.D. 2d 707, 236 N.Y.S.

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[16] I do not believe that the investor's "responsibility *** for acts of the partnership" mentioned by the court in Sloan is an important determinant under the Howey test of whether the interest is a security. It may have some relevance under the "risk-capital" test mentioned below.

2d 549 (2d Dept. 1962), aff'd, 14 N.Y. 2d 508, 248 N.Y.S 2d 228 (1964). The partnership agreement or articles may provide that certain general partners have no "legal right to a voice in partnership matters," and, in such case, the general partnership interest may constitute an investment contract under the test set forth in Howey. Professor Bromberg has written:

> "In theory, general partners have equal rights to participate in management. CRANE & BROMBERG ON PARTNERSHIP 374-375 (1968). This would seem to preclude one from relying solely on another for profits, and thus to rule out an investment contract. But the theoretical principle may be varied by the agreement of the partners, which may lodge all control in designated partners." 1 A. Bromberg, Securities Law: Fraud, Sec. 4.6 (331) (1973); Jennings and Marsh, supra, at 308.

Thus in Pawgan v. Silverstein, supra, 265 F. Supp. at 900, where the articles of the general partnership vested all managerial and operational authority in the three "managing partners," this court (Metzner, J.) held that the interests of the 17 non-managing general partners were "securities."

However, unlike in Pawgan, the Partnership Articles and Agreement in the present case provide that the general partners, through the exercise of their voting powers, are to have complete managerial control of the business of duPont Glore. Therefore,

under the Howey test, as applied in New York Stock Exchange, Inc. v. Sloan, supra, the general partnership interests in the present case are not securities. Although, as noted below, certain responsibilities were delegated to several committees and a managing director, Article 21st vested the power of decision as to the firm's policies, management, and "any matter whatsoever" in a majority in interest [17] of the general partners:

> "TWENTY-FIRST: In the event of any dispute or difference of opinion as to policies of the partnership or as to the management of its business or any matter whatsoever in connection with the conduct thereof, the final power of decision shall, subject to the provisions of these partnership articles, [18] be vested in a majority in interest of the general partners, and each partner hereby agrees to abide by any decision so made.***"

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17 For purposes of determining a "majority in interest," the interest of each general partner was based on the number of voting units he held. (Article 1st).

18 There was no provision which gave any officer or person the power to override the decision of the general partners as to the management and operation of the firm.

The general partners also had the power to appoint and remove the managing director and any member of any committee. (Article 19th (b),(c)). In addition to their general overall managerial control, the general partners had power to determine partners' salaries; to admit general and limited partners; to require a general partner to withdraw; and to increase or decrease the membership of any committee. (Articles 8th (3), 12th, 13th, 19th(d)). In addition they had the right to inspect the partnership and committee records. (Articles 15th, 19th(e)). I adopt the reasoning of New York Stock Exchange v. Sloan, supra, that since, under the Partnership Articles, substantial "legal right[s] to a voice in partnership matters" inhered in the general partnership interests, those interests were not securities, irrespective of the degree to which Kohns and Mundheim actually chose to exercise their rights.

I do not agree with plaintiffs' reasoning that they exercised no control over the firm because they held a minority of the total voting units [19] and they might be defeated by an opposing majority on some issues. In fact, no individual held a majority. [20] Of the 74 general

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[19] Together they held approximately 5% of the voting units.

[20] Edmond duPont held 36% of the voting units.

partners, Kohns and Mundheim were the sixth and seventh largest holders of voting units, respectively. They were clearly in a position to seek a majority for their position, and thereby exercise managerial control over the firm.

I hold that Kohns and Mundheim's interests were not securities under the Howey and Sloan tests on the basis of the facts set forth above. The difficulties attributed to the Howey test are not present here. The general partners' rights and duties under the Partnership Articles were not merely "nominal" and were not given to the general partners merely as a means of evading the strict Howey test. Moreover, by virtue of their managerial powers and express rights of inspection, they could inform themselves as to the condition of the business and, through their efforts, promote its success.

III.

Not only do the general partnership interests in this case fail to meet the Howey test; they do not even satisfy certain of the more liberal definitions of "securities" adopted in jurisdictions which have abandoned or relaxed the Howey test.

Certain state courts have rejected the Howey test altogether, and, following Silver Hills Country Club v. Sobieski, 55 Cal. 2d 811, 361 P. 2d 906 (1961), have held that an investor's interest is a security if the investor places his capital at the risk of the enterprise and receives some benefit in exchange.[21] Accord, In the Matter of the State of Alaska Department of Commerce v. Spa Athletic Club, Inc., 3 CCH Blue Sky L. Rep. ¶71,136 (Alaska Dept. of Commerce 1974); Lundquist v. American Campground Memberships, Inc., 3 CCH Blue Sky L.

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[21] Sobieski involved an offering of memberships in a country club. The "risk capital" test was created to overcome the difficulty that purchasers of such memberships did not receive any pecuniary "profit" as Howey apparently requires.

Rep. ¶71,196 (Wash. Super. 1973); People v. Witzerman, 3 CCH Blue Sky L. Rep. ¶71,074 (Cal. Ct. App. 1972); contra, Brown v. Computer Credit System, Inc., 3 CCH Blue Sky L. ¶71,061 (Ga. Ct. App. 1973); see Long, Partnership Interests as Securities, supra, at 603-04. In Sobieski, Justice Traynor of the California Supreme Court stated the rationale of the "risk capital" test as follows:

> "Since the [California] act does not make profit to the supplier of capital the test of what is a security, it seems *** that its objective is to afford those who risk their capital at least a fair chance of realizing their objectives in legitimate ventures whether or not they expect a return on their capital in one form or another." 361 P. 2d at 908-909.

Under this test, virtually every conceivable investment, including the general partnership interests in the present case, would qualify as securities. However, no federal court has adopted the "risk capital" test.

Certain state and federal decisions have, however, combined the "risk capital" test with a modified version of the Howey definition. In State v. Hawaii Market Center, Inc., 485 P. 2d 105 (Hawaii 1971), the court held that an investment contract is created where four requirements are satisfied:

"(1) an offeree furnishes initial value to an offeror, and

"(2) a portion of this initial value is subjected to the risks of the enterprise, and

"(3) the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and [22]

"(4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise." 485 P. 2d at 109. [23]

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[22] In including this element in the test, the court may have been influenced by the United States Supreme Court's holding in S.E.C. v. C. M. Joiner Leasing Corp., supra, 320 U.S. at 352-53, where the Court laid special emphasis on the representations made to the investor:

> "The test *** is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be."

[23] In Sec. Act Rel. 5211, CCH Fed. Sec. L. Rep. 78,446 at 80,976 (1971), the SEC stated that "the court's analysis of the investment-contract concept in the Hawaii Market Center case is equally applicable under the federal securities laws."

See S.E.C. v. Glenn W. Turner Enterprises, Inc., supra, 348 F. Supp. at 374-75; Venture Investment Co. v. Schaefer, 3 CCH Blue Sky L. Rep. ¶71,031 (D. Colo. 1972) (Colorado Uniform Securities Act); State ex rel. Park v. Glenn Turner Enterprises, Inc., 3 CCH Blue Sky L. Rep. ¶71,023 (Idaho Dist. Ct. 1972); State ex rel. Fisher v. World Market Centers, Inc., 3 CCH Blue Sky L. Rep. ¶71,034 (Okla. Dist. Ct. 1972).

The first three requirements are relatively easily met, and attention has focused on the fourth requirement: the absence of "the right to exercise practical and actual control over the managerial decisions of the enterprise." (emphasis added).

Indeed, after the Hawaii Market Center decision, the federal courts in several circuits adopted this fourth requirement, the absence of managerial control, as the single test of an investment contract. S.E.C. v. Glenn W. Turner Enterprises, Inc., supra, 474 F. 2d at 482 (9th Cir. 1973); S.E.C. v. Koscot Interplanetary, Inc., supra, 497 F. 2d at 483 (5th Cir. 1974); Nash & Associates, Inc. v. Lum's of Ohio, Inc., 484 F. 2d 392,

395 (6th Cir. 1973);[24] see also In the Matter of Continental Marketing Associates, Inc., supra; Shaul v. Consumer Companies of America, Inc., 3 CCH Blue Sky L. Rep. ¶71,022 (Ohio C.P. 1972). The leading case of S.E.C. v. Glenn W. Turner Enterprises, Inc. stated this new test as follows:

> "Rather we adopt a more realistic test, whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." 474 F. 2d at 482. (Emphasis added)

The SEC has also adopted the position that an interest is a security only where there is "no active participation in the management and operation of the

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[24] Lino v. City Investing Co., supra, 487 F. 2d at 693, seems to focus on the quantum of effort required of the investor, rather than on its quality as managerial or non-managerial effort. Thus the court held that a contract under which the investor gained the right to find and train franchise distributors for a commission was not a security because the investor was required to make significant sales efforts, open a sales center, and devote full time to finding and training franchise distributors.

scheme on the part of the investor." Sec. Act Rel. 4877, CCH Fed. Sec. L. Rep. ¶77,462 (1967) (emphasis added). In Sec. Act Rel. 5211, CCH Fed. Sec. L. Rep. 78,446, the Commission stated, with specific reference to pyramiding schemes:

> "The term 'security' must be defined in a manner adequate to serve the purpose of protecting investors. The existence of a security must depend in significant measure upon the degree of managerial authority over the investor's funds retained or given; and performance by an investor of duties related to the enterprise, even if financially significant and plainly contributing to the success of the venture, may be irrelevant to the existence of a security if the investor does not control the use of his funds to a significant degree. The 'efforts of others' referred to in Howey are limited, therefore, to those types of essential managerial efforts but for which the anticipated return could not be produced." (Emphasis added)

Adoption of this liberal version of the Howey test may be justified by language in the Howey opinion itself which suggests that the "efforts" to which the Court referred were managerial efforts. [25] Long,

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[25] In Howey, the Court said:

> "Thus all the elements of a profit-seeking business venture are present here. The investors provide the capital and share in the earnings and profits; the promoters manage, control, and operate the enterprise." 328 U.S. at 300. (Emphasis added)

Partnership Interests as Securities, supra, at 601-02. This test reduces the possibility of evasion by inclusion of a provision requiring the investor to contribute nominal efforts. Moreover, it is consistent with the above-mentioned view that where the investor obtains managerial control and thereby gains access to information about the issuer, he has less need of the protection of the fraud and disclosure provisions of the securities laws.

Although, as noted, the decisions in this circuit had previously adhered to a literal interpretation of Howey, the Court of Appeals in 1050 Tenants Corporation v. Jakobson, supra, 503 F. 2d at 1378 n.5[26], suggested in dictum that it was willing to go beyond the most liberal definition of an investment contract in other circuits. Thus the court said that

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26 The court first held that shares in a cooperative were "stock" and therefore securities. The court held alternatively that the shares were also investment contracts since "the requirement that expectations of profit derive 'solely from the efforts of the promoter[s] or a third party,' 328 U.S. at 299, (footnote omitted) is clearly satisfied here." Thus the court's hypothetical concerning a "small role" in management is clearly dictum.

even if the investor participates to a small degree in the management of the enterprise, his interest may qualify as a security:

> "Even if the shareholder-tenants were to assume some small role in the management of the venture, that alone would not defeat the Howey 'reliance' requirement." [citations omitted]. 503 F. 2d at 1378 n.5. [27]

The general partnership interests in the present case do not constitute securities under the "non-managerial efforts" test of S.E.C. v. Glenn W. Turner Enterprises, Inc., supra, or even according to the above-quoted statement from Jakobson, whether or not it correctly states the law in this circuit. Plaintiffs have contended that the real power was lodged in Edmond duPont, Wallace C. Latour and Edwin B. Peterson. Curiously, plaintiffs attribute these three individuals' power partly to their membership on the Special Committee of the Partners. (See, e.g., Affidavit of Paul L. Kohns, sworn to April 1, 1975, ¶9.) However, the Partnership Articles show that this committee was authorized to perform only such ministerial acts as filing powers of attorney on behalf of the partnership, adopting the use of a mechanical signature and things of like nature. (Article 20th).

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[27] It is questionable whether this statement is supported by prior authority. In the first case cited in support of it, it was found that the interest in question was not a security because of the quantum of non-managerial effort required of the investor. That holding does not support the position taken by the court in the quoted statement.

Indeed the undisputed facts presented on this motion, consisting largely of plantiffs' own deposition testimony, clearly establish that both Kohns and Mundheim had a very substantial degree of managerial responsibility and control at duPont Glore.

I have already mentioned the voting rights and powers exercised by Kohns and Mundheim. In addition, and perhaps most important, Kohns and Mundheim were members of the eight-man Finance Committee. (Kohns Affidavit, ¶9; Exhibit E to Camhy Affidavit). [28] They were entitled to membership on this and all other committees by reason of their position as general partners. (Article 19th(c)). The Partnership Articles enumerate several of the functions of this committee, including: the determination of the rate of return to each limited partner on his cash contribution and the return to each general partner on both cash and non-cash contributions;

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[28] I consider it immaterial that Mundheim claims not to have been a member of this committee immediately after joining duPont Glore. Exhibit E to the Camhy affidavit shows that he was a member on July 23, 1970, just three weeks after consummation of the merger. (See Mundheim Tr. 299).

the approval of withdrawals of net profits; the approval of the contribution or withdrawal of additional capital by partners; the approval of capital contributions in the form of "Secured Capital Notes"; the determination of whether to hold or sell securities contributed as capital or pledged as collateral; and the valuation of certain securities. (Articles 8th, 4th(a), (b), 7th, 4th(e), 6th(e) and 22nd).

However, the most emphatic statement of the importance of the Finance Committee and hence of Kohns and Mundheim's managerial powers in the firm appears in Kohns' deposition:

> "Q. What was the function of the finance committee?
>
> "A. It was the top authority and it was the executive group that ran the firm. It was the senior-- it was the policy making group." [29] (Kohns Tr. 298)

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[29] The court does not believe that Kohns' subsequent, self-serving attempt to mitigate the effect of this admission (See Kohns Affidavit, ¶9) raises a genuine issue of material fact.

As two of the eight general partners on this senior policy-making committee that ran the firm, Kohns and Mundheim had powerful managerial positions which far exceeded in importance the "small roles" in management mentioned in Jakobson, supra.

In addition, after he became a partner, Mundheim filled a vacancy on the Executive Committee which is charged by the partnership articles with "general *** management of the partnership and the conduct of its affairs." (Article 19th (b)(iii)).

I attach less importance to Kohns and Mundheim's membership on the 24-man Board of Directing Partners which, under the Articles, was to "review" all actions taken by the other committees and the managing director. (Article 19th(b)(i)). This committee was largely honorary and, according to Kohns, "did not involve any work whatsoever." (Kohns Tr. 199; Kohns Affidavit, ¶9; Camhy Affidavit, ¶7). Nonetheless, the members did gain information about the firm through this committee (Kohns Tr. 199); and Kohns did have the responsibilities of a member of the task force on reducing costs to which he was appointed on July 15, 1970. (Kohns Tr. 235).

The undisputed facts also show that each of the plaintiffs' positions at the firm was a full-time occupation. I deem it to be of no significance that the Agreement does not require either to perform specific duties in exchange for their salaries of $36,000.(Agreement §7). It is undisputed that both had the right to participate actively in the firm's business and that both exercised that right.

Despite his intention eventually to retire, Mundheim agreed to remain active for at least six months (Mundheim Tr. 290), and he was given the supervision of the foreign office (Mundheim Tr. 299), a position similar to the one he had held at Hirsch & Co.

Consistent with his determination to "die with his boots on," Kohns was active and came into the office regularly during the summer and fall of 1970, except during the time he was on vacation.(Kohns Tr. 237).[30]

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[30] I again take the view that Kohns' later contradictory affidavit made with this motion in mind does not raise a genuine issue of fact.

For all the reasons stated above, the interests in question were not securities according to the criteria set forth in S.E.C. v. Glenn W.Turner Enterprises, Inc., supra, and 1050 Tenants Corp. v. Jakobson, supra.

IV

Some decisions, including one from this district, have stated that the proper test of whether a partnership interest is a security is whether or not the issuer is a "bona fide" partnership or a partnership "in the accepted sense." Pawgan v. Silverstein, supra. According to these decisions, a "bona fide" partnership interest cannot be a security.

The state blue sky decisions adopting this test, e.g., Rivlin v. Levine, 195 Cal. App. 2d 13, 15 Cal. Rptr. 531 (1961); Garbo v. Hilleary Franchise Systems, Inc., 479 S.W. 2d 491 (Mo. App. 1972), have found several attributes of most securities to be inconsistent with the concept of a partnership. [31] Chief among these

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[31] In certain decisions where it was found that the interest in question was a security under the Howey test, the court felt that this necessitated a finding that the issuer was not a partnership under state partnership law. E.g., Garbo v. Hilleary Franchise Systems, Inc., supra. However, under the Uniform Limited Partnership Act
(Footnote continued)

are the fact that many securities may be transferred without the approval of other security holders of the same issuer; the fact that most securities can be offered to the public; and the fact that holders of the securities of one issuer frequently have no personal relationship with one another. Long, Partnership Interests as Securities, supra, at 588, 605.

The courts and commentators have focused on the first criterion: that is, whether each partner has the right to approve or disapprove the admission of new members to the partnership or the transfer of partnership interests.[32] See Rivlin v. Levine, supra; 1 Loss, supra, at 502-506; 4 Loss, supra, at 2551; Long, Partnership Interests as Securities, supra, at 606.

(Footnote continued from previous page)

adopted in New York State, an interest may qualify as a limited partnership interest even though it is freely transferable and is publicly offered to people with no personal relationship to one another. Long, Partnership Interests as Securities, supra, at 588.

. The bona fide partnership test may be based on the time-honored blue-sky rule that a "joint adventure" is not a security. See Pollikoff v. Levy, supra; Cross v. Pasley, 270 F. 2d 88, 92 (8th Cir. 1959), cert. denied, 362 U.S. 902 (1960).

[32] This is referred to throughout the literature as the right of delectus personarum.

The general partnership interests in duPont Glore were not securities according to these three criteria. The interests were not offered to the public, and Kohns and Mundheim had a day-to-day working relationship with the other general partners. Although each partner did not retain the right to disapprove new partners, see §40(7), N.Y. Partnership Law, there was a degree of delectus personarum, since a majority in interest of the general partners was required to approve the admission of new general partners. (Article 12th).

The federal courts have apparently applied the Howey test in the light of some or all of the three criteria of the bona fide partnership test. Thus in Pawgan v. Silverstein, supra, where non-managing general partners had no right to approve new partners and the general partnership interests were assignable, the court found that the general partnership was not "a partnership in the general sense." [33]

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[33] It is difficult to determine what factors were most important to the decision in Pawgan since the opinion incorporates the statement of facts in a related case, United States v. Silverstein, 237 F. Supp. 446 (S.D.N.Y. 1965), and does not comment in detail on the significance of those facts.

In Pawgan, as noted, managerial control was vested in three "managing partners"; thus the interests also satisfied the Howey test of a security.

In Vincent v. Moench, 473 F. 2d 430, 436 (10th Cir. 1973), the court held that interests in a partnership formed by three siblings and their families to operate a livestock business were not securities. In addition to finding that plaintiff had substantial control of the partnership, the court emphasized that there had been no public offering of the partnership interests and that the partners knew each other well and were bound together in a family relationship.

In the present case, as noted, all three requirements of a bona fide partnership are met. However, the most striking fact in regard to this test is that Kohns and Mundheim's participation in duPont Glore was their daily occupation and their profession. They had a professional and business relationship with the other general partners like that of a firm of accountants or lawyers. DuPont Glore was clearly a partnership "in the accepted sense," and this furnishes an alternative basis for finding that the general partnership interests were not securities.

V.

In contrast to the general partnership interests, Kohns and Mundheim's limited partnership interests clearly satisfy the definition of a security.

Under New York partnership law, limited partners may not interfere "in any manner with the conduct and control of the partnership business." Lichtyger v. Franchard Corp., 18 N.Y. 2d 528, 535, 277 N.Y.S. 2d 377, 383 (1966); Executive Hotel Associates v. Elm Hotel Corp., 41 Misc. 2d 354, 358-59, 245 N.Y.S. 2d 929, 933 (1963). Their rights, as set forth in §99 of the Partnership Law, are limited to the rights to receive a share of profits, to inspect partnership records, and to have dissolution of the partnership under certain circumstances.

Because limited partners must, by statute, rely solely on the efforts of others for their profit, limited partnership interests have been held to be securities in this district. New York Stock Exchange, Inc. v. Sloan, supra, CCH Fed. Sec. L. Rep. ¶95,083 at 97,843; see Klebanow v. New York Produce Exchange, 344 F. 2d 294, 297 (2d Cir. 1965) (stating that the limited partner's status is analogous to that of the corporate shareholder). Moreover, such interests are routinely

viewed as securities by the SEC in administrative proceedings, see, e.g., American Plan Investment Corp., CCH Fed. Sec. L. Rep., ¶78,044 (1971) (no-action letter),[34] and the Commission has stated that the "formal controls" retained by most limited partners do not deprive the interest of its character as a security under the Howey test.[35] Sec. Act Rel. 4877, CCH Fed. Sec. L. Rep. ¶77,462 (1967); 4 Loss, supra, at 2549.

Since the Partnership Articles of duPont Glore do not purport to give limited partners powers beyond those specified in the statute, the authorities cited above support the conclusion that Mundheim and Kohn's limited partnership interests were securities.

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[34] Rule 3a11-1 under the Exchange Act, 17 C.F.R. §240.3a11-1, provides that a "limited partnership interest" is an "equity security" for purposes of §§12 and 16 of the Exchange Act. It is not clear that this definition applies to §10(b). Weinberger v. New York Stock Exchange, Inc., 335 F. Supp. 139, 146 n.21 (S.D.N.Y. 1971).

[35] Under New York State law, limited partnership interests in real estate syndications are deemed to be securities. Reiter v. Greenberg, 21 N.Y. 2d 388, 392, 288 N.Y.S. 2d 57, 61 (1968); General Business Law §1352-e.

VI.

Defendants assert that because Kohns and Mundheim were general partners and exercised the managerial powers inherent in their general partnership interests, their limited partnership interests cannot qualify as securities.

Neither side has cited any authority on this point. However, the Court of Appeals' recent decision in Laupheimer v. McDonnell & Co., Inc., 500 F. 2d 21 (2d Cir. 1974), while by no means directly in point, does suggest that plaintiffs' limited partnership interests may be considered separately from their general partnership interests. In Laupheimer, the plaintiff was allegedly induced by fraud to become an officer of the defendant, a member firm of the Exchange and the American Stock Exchange, and thereby to become a member of the exchanges himself. Shortly thereafter, plaintiff completed a purchase of the defendant brokerage firm's stock. The defendant sought to bar plaintiff's federal securities action and compel the plaintiff to arbitrate his fraud claims under the provisions of the exchanges' constitutions which require arbitration of claims between members of the exchanges and officers and shareholders of member corporations. The court held that plaintiff was not

required to arbitrate his claims since the fraud "was perpetrated against appellant Laupheimer not as an officer of the firm, a member of the Amex or a stockholder, but as an outsider who had capital desired by the firm." 500 F. 2d at 25. The court emphasized that some of the misrepresentations had been made before plaintiff became an officer and exchange member. Moreover, defendant had offered plaintiff the stock and the opportunity to become an officer as a "package"; thus it was immaterial that plaintiff had become an officer shortly before the purchase of stock was closed. See Danford v. Schwabacher, 342 F. Supp. 65 (N.D. Cal. 1972), appeal dismissed, 488 F. 2d 454 (9th Cir. 1973).

In the present case, the fraudulent inducements to purchase limited partnership interests were allegedly made before Kohns and Mundheim became general partners. Moreover, plaintiffs purchased their limited partnership interests at the same time as their general partnership interests, not after they had become general partners. In light of these facts, it may be concluded that the allegedly fraudulent inducements were made to plaintiffs and they purchased their limited partnership interests not as general partners, but as "outsider[s] who had capital desired by the firm." Laupheimer, supra, 500 F. 2d at 25. I therefore conclude that plaintiffs' limited

partnership interests may be considered separately from their general partnership interests purchased at the same time. Considered separately, the former are clearly securities.

An examination of the New York Partnership Law does not alter this conclusion, for under §101(1), a general partner in a firm may also hold a limited partnership interest. Moreover, for purposes of the Howey test, all rights and powers to participate in the management of the firm derive from the general partnership, not the limited partnership, interests.

VII.

Kohns and Mundheim contend that where, as here, a transaction involves a purchase of securities (the limited partnership interests) in addition to non-securities (the general partnership interests), the purchase of non-securities is covered by §§10(b) and 17(a) as a matter of substantive law. I reject this view. The leading case of Errion v. Connell, 236 F. 2d 447, 454 (9th Cir. 1956), cited by plaintiffs, holds only that in the situation above described, the court may exercise pendent jurisdiction over state common law claims concerning

the non-securities. Accord, Herpich v. Wallace, 430 2d 792, 808 (5th Cir. 1970) (dictum); Collins v. Rukin, 342 F. Supp. 1282, 1284 (D. Mass. 1972); Tully v. Mott Supermarkets, Inc., 337 F. Supp. 834, 844 (D. N.J. 1972). [36]

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[36] The Ninth Circuit has apparently now adopted the position urged by plaintiffs. Hecht v. Harris, Upham & Co., 430 F. 2d 1202 (9th Cir. 1970).

The only case in this district cited by plaintiffs does not support their position. In Sinva v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 253 F. Supp. 359, 367 (S.D.N.Y. 1966), one claim in a customer's complaint charged a broker with fraud involving non-securities and the customer's securities account. However, in refusing to dismiss the court did not adopt the position urged by plaintiffs. It merely applied the rule that on a motion to dismiss, a claim will not be dismissed unless, taking the allegations of the complaint in the light most favorable to the plaintiff, it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the §10(b) or §17(a) claim.

VIII.

It is thus appropriate to consider whether the court should exercise pendent jurisdiction over Kohns and Mundheim's state law claims of fraud, misrepresentation and breach of fiduciary duty[37] concerning their general partnership interests as well as their other interests. The test of whether pendent jurisdiction exists is stated in United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966):

> "The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 U.S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole. (footnote omitted)"

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[37] The complaint nowhere contains the allegations of breach of contract by the Exchange referred to in plaintiffs' memorandum. For reasons set forth below, the court need not consider plaintiffs' contentions in this regard on the present motion.

Whether the federal claims are substantial is to be determined on the basis of the pleadings, not upon the evidence ultimately introduced at trial. A. H. Emery Co. v. Marcan Products Corp., 268 F. Supp. 289, 292 (S.D.N.Y. 1967), aff'd, 389 F. 2d 11 (2d Cir.), cert. denied, 393 U.S. 835 (1968). Here the federal securities claims in the complaint concerning plaintiffs' limited partnership interests are plainly substantial.

Moreover, the state and federal claims of fraud derive from a "common nucleus of operative fact," viz.: the alleged misrepresentations and omissions which allegedly induced Kohns and Mundheim to purchase both their general and limited partnership interests.

Finally, aside from the restrictions of federal jurisdictional requirements, Kohns and Mundheim would ordinarily be expected to try their interrelated state and federal fraud claims in a single action. Indeed, there is a strong federal policy to resolve all issues of a single controversy in one suit, Tully v. Mott Supermarket, Inc., supra, 337 F. Supp. at 844, and neither side would gain anything by requiring plaintiffs to bring two separate actions.

Not only does the court have power to determine the state law claims, but in the circumstances of this case, the court should plainly exercise its pendent jurisdiction. The paramount fact underlying this conclusion is that the case has been pending for three years, and this is literally the eve of trial.[38] Seventeen witnesses have been deposed; their testimony covers 2,850 pages. Over 450 exhibits were marked during the depositions, and thousands of others were examined. To dismiss plaintiffs' state law claims and require them to bring a separate action would be to waste the prodigious efforts of counsel in preparing for trial on these claims. This I am unwilling to do.

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[38] The case has been on the court's calendar for some time, and it will be tried as soon as possible after the decision of this motion.

IX.

Plaintiffs assert for the first time in their memorandum and affidavits on this motion that their complaint states claims under §6(b) of the Exchange Act, 15 U.S.C. §78f(b), for breach of the Exchange's duty to regulate its members. In reply, defendants note that the complaint, as it now stands amended, resulted from the Exchange's motion for a more definite statement. In its notice of motion, dated April 25, 1972, the Exchange asked specifically: "(b). What statute or principle of common law gives to plaintiffs a claim *** against defendant ***." In response, the affidavit of Richard Spinogatti stated: "In answer to [this] question, I assert that Section 10(b) *** the rules and regulations *** promulgated thereunder and Section 17 *** are such statutes." By an order dated June 28, 1972, this court granted the Exchange's motion. Plaintiffs then filed the amended complaint which followed Spinogatti's assurances, and specified §§10(b) and 17 as the bases of plaintiffs' claims, but made no mention of §6. Defendants contend that they would be prejudiced if plaintiffs were allowed to introduce a wholly new theory some three years after the amendment of the complaint and after all discovery has been completed.

There is no need to consider these contentions in the present posture of this litigation. There has been no motion by plaintiffs to amend the complaint to include a §6 claim, and no motion to dismiss under Rule 12(b)(6) by defendants. The sufficiency of the complaint is not in issue. Insofar as the motion for summary judgment is directed to plaintiffs' federal claims, it seeks a judgment that on the undisputed facts plaintiffs may not maintain an action under §10(b) or §17(a). [39] I need not decide whether plaintiffs may recover on a §6 claim [40] or have raised issues of fact as to some other theory in order to decide whether defendants are entitled to summary judgment dismissing certain claims under §§10(b) and 17. [41]

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[39] Although the notice of motion refers generally to "the alleged federal securities laws claims," defendants' memorandum makes clear that the motion is directed only to "claims *** pleaded under Section 17 *** and Section 10(b) *** ." (p.1).

[40] It should be noted that New York Stock Exchange, Inc. v. Sloan, supra, CCH Fed. Sec. L. Rep. ¶95,083 at 97,845, held tnat a general partner of a member-brokerage firm may not maintain an action under §6. I need not decide whether to follow Judge Lasker's decision on this motion.

[41] If plaintiffs so choose they may request at trial to be allowed to amend their complaint or introduce proof in support of a §6 claim.

Conclusion

Defendants' motions for summary judgment dismissing Kohns and Mundheim's claims under §10(b) of the Exchange Act and §17(a) of the Securities Act are granted solely with respect to Kohns and Mundheim's general partnership interests in duPont Glore. Defendants' motions for summary judgment dismissing plaintiffs' §§10(b) and 17(a) claims are denied with respect to plaintiffs' limited partnership interests. Defendants' motions are denied as to Kohns and Mundheim's pendent state law claims concerning both their general and their limited partnership interests. Plaintiffs' contention that the complaint states claims for a violation of §6 of the Exchange Act and for breach of contract need not be reached.

SO ORDERED.

Dated: New York, New York
June 5, 1975

ROBERT L. CARTER
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM,

Plaintiffs,

- against -

72 Civ. 775

EDMUND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS & SELLS and NEW YORK STOCK EXCHANGE, INC.,

44715

Defendants.

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CARTER, District Judge

O P I N I O N

I

The Nature of the Proceedings

Plaintiffs are former partners of Hirsch & Co., a long established and prestigious Wall Street brokerage firm, now in liquidation. Suit as initially instituted invoked Section 27 of the Secutities Exchange Act of 1934, 15 U.S.C. §78aa, and Section 22 of the Securities Act of 1933, 15 U.S.C. §77v, as the bases for the court's jurisdiction. The complaint alleged violations of Section 10b of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), Section 17 of the Securities Act of 1933, 15 U.S.C. §77q, and Rule 10b-5 of the Securites and Exchange Commission, as well as pendent jurisdiction over claims of common law fraud, misrepresentation and breach of fiduciary duty. Originally Edmund duPont, Wallace C. Latimer, Milton I. Speicher, Francis I. Dupont & Co. ("FID"), F. I. Dupont, Glore Forgan & Co., du Pont Glore Forgan Inc., Haskins & Sells ("H&S") and the New York Stock Exchange ("NYSE") were named as defendants. Prior to trial, however, the complaint against all the defendants except H&S and the NYSE was dismissed with prejudice. These defendants remained in the case, however, since cross-claims had been filed against them by H&S and the NYSE.

Plaintiffs' theory of liability, as enunciated at trial and thereafter, is that at the time of plaintiffs' investment in FID, defendants knew and failed to disclose to plaintiffs FID's violation of the net capital requirements mandated pursuant to Section 8b of the Securities Exchange Act of 1934, 15 U.S.C. §78h(b), FID's violation of the requirement of accurate reporting of securities transactions required pursuant to Section 17a of the Securities Exchange Act of 1934, 15 U.S.C. §78q(a), and Rule 17a-3 of the Rules of the Securities and Exchange Commission, 17 C.F.R. §240.17a-3. It was plaintiffs' contention that defendants' failure or refusal to disclose the above stated facts to them constituted concealment, misrepresentation, or non-disclosure of material facts within the meaning of Section 10b of the Act, Rule 10b-5 of the Commission and the common law. Since for reasons articulated below, we conclude that no violations of federal securities laws, or of common law strictures have been proved, judgment is awarded to defendants H&S and NYSE, and all cross-claims are dismissed.

II.

Background and Governing Facts

Plaintiffs are all sophisticated and knowledgeable business men. Each had considerable and lengthy experience in the brokerage business chiefly in their former firm, Hirsch & Co. ("Hirsch"), a member firm of NYSE. Howard C. Hirsch joined the firm, then known as Hirsch & Lillienthal & Co., in 1920; Paul L. Kohns came on board in 1930, and Marshall S. Mundheim in 1952. The firm became Hirsch & Co. in or about 1940. Kohns became the firm's managing partner in 1942, and during the 1960's as Howard Hirsch became a less active participant in the firm's operations, Kohns and Mundheim, between them, increasingly became the dominant force in the firm's operations. In 1969, the future began to look uncertain for a firm of Hirsch's size, and, for the first time in its history, it experienced an operating loss. An increased volume of trading had begun to create a deluge of paper work for brokerage firms to deal with, and highly sophisticated technology became essential--data processing equipment, computers and various other electronic equipment--to the successful and efficient operation of brokerage houses. Only a large brokerage firm with customer accounts and trading volume considerably in excess of that of Hirsch

could safely assume the overhead costs of the new technology. Plaintiffs, therefore, concluded that Hirsch's continued viability necessitated its merger with another brokerage firm. The firm which became plaintiffs' choice as a merger candidate was FID.

The latter, a member firm of NYSE and the third largest brokerage firm on Wall Street, was burdened with back-office inefficiency. On April 10, 1969, the firm was censured before the Board of Governors of NYSE for "failure to maintain current and accurate records" over an extended period. In the summer and continuing into the fall of 1969, FID was the target of an investigation by NYSE. The investigation revealed that FID's answers to the special financial questionaire were in accord with its books and records, except that unsecured customer accounts with debits totalling approximately two-and-one-half million dollars and over one million in short securities had not been reported, and losses in redemption of U. S. Treasury bills were understated by over 98 thousand dollars. Its net capital ratio was over 2198% on June 30, 1969 (2000 maximum allowed) and 2181% on July 30, 1969, and 76,128% on September 28, 1969. As of January 20, 1970, its net capital ratio was 1782%.

H&S made a surprise audit of FID pursuant to the rules of the NYSE and the SEC. This audit disclosed that as of September 28, 1969, FID was not in compliance with NYSE Rule 325 net capital requirements, the existence of security long differences of approximately 28 million dollars (these are securities in hand for which no record of ownership has been found) and security short differences of approximately 6 million dollars (securities cannot be found for which a record of ownership exists).

On December 16, 1969, representatives of NYSE, H&S and FID met to discuss ways and means to resolve the firm's net capital compliance problems. As a general practice, research usually concentrates first on resolving security short differences because the extent of such differences constitutes a potential firm exposure to liability. At the December 16th meeting, however, Robert Bishop, Vice President of NYSE, suggested that in view of FID's net capital compliance problems, the security long differences might prove the most fruitful area for immediate research since there was a likely prospect that such research would establish that a sizable portion of the securities in the long differences category probably belonged to FID. The suggestion was followed, and the firm liquidated

enough of its security long differences to bring it into net capital compliance by the end of 1969.

The NYSE 1969 investigation resulted in FID being censured again by NYSE on February 10, 1970, and the firms and its officers being fined $100,000, the largest such fine levied by NYSE against any of its member firms. Just the day before the February 10th censure and fine became headline news, the daily newspapers in New York carried a report that FID had suffered operating losses in 1969 totalling 7.7 million dollars.

In the early part of 1970, plaintiff began serious merger negotiations with FID. A committee of Hirsch partners consisting of plaintiffs Kohns and Mundheim and Robert Fraiman [1/] were named to investigate and negotiate a merger w th FID.

1/ Fraiman was a member of the NYSE Board of Governors on April 10, 1969, and on February 10, 1970, when FID had been censured by the NYSE Board of Governors.

Frank Garibaldi, comptroller at Hirsch, was designated by Kohns and Mundheim to take a close look at FID so that the pros and cons of the merger could be properly evaluated. Garibaldi was given carte blanche to determine what FID documents he needed to review in order to accomplish his mission. Whatever Garibaldi felt he needed he would advise Mundheim who in turn would request the materials from Vincent Gentele, FID's comptroller. Whatever was requested was turned over. Garibaldi asked for and received copies of the latest FID balance sheet, special operations questionaire, as well as budgeting and financial questionaires.

After reviewing these documents, Garibaldi prepared an analysis of what the material demonstrated and framed a number of questions he felt needed further exploration. He reviewed his analysis and proposed questions to be asked of FID with Kohns, Mundheim and Harold Petrillo. 2/ This was followed by a meeting

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2/ Petrillo, an accountant by profession and a partner of H&S, was in charge of Hirsch and FID audits. H&S had both accounts. Nothing in the record clearly defines Petrillo's role. There was no evidence that Petrillo had been hired as a consultant to advise Hirsch in regard to the merger, or that H&S had assumed any responsibility for the merger negotiations. Petrillo seems to have participated to the extent he did as a personal gesture based on his relationship with Kohns.

between Garibaldi and Gentele. In his conversation with Gentele, Garibaldi learned that FID did not, as was Garibaldi's practice at Hirsch, charge security short differences against capital, and that Gentele was unaware of any standing commitment of 20 million dollars on which FID could call.

Garibaldi reported all that he had learned in his meeting with Gentele to Kohns and Mundheim. He confirmed what they already knew: that FID's back-office problems were a "bloody mess," and that he was generally negative about the proposed merger. The merger discussions became public before the parties were prepared publicly to acknowledge that negotiations were taking place, and discussions were terminated on April 23, 1970.

In May, the negotiations were resumed. Glore, a brokerage firm with substantial underwriting accounts, became a third party to the discussions. Kohns testified that the introduction of Glore as a third party pleased him because he hoped that a partner of Glore, whose administrative skills he respected, would take charge of the back-office operations of the merged firm. At a meeting at Mundheim's home attended by the plaintiffs, Fraiman, Edmund Dupont and Wallace Latour, Kohns asked Edmund Dupont about the rumored

20 million dollar standby commitment. He was assured of the existence of the fund and was told that it presently stood at only 17.5 million because 2.5 million of it had already been used, but Kohns was assured that additional funds, if needed, would be forthcoming from Wilmington.

When the negotiations resumed in May, Norman Weil, one of the Hirsch partners, was asked to examine FID operations and Garibaldi updated the analysis he had made earlier. The latest operations questionaire, which disclosed that losses at FID which had reached 7.7 million dollars in 1969 were continuing in 1970 at an accelerated rate, was examined by both Garibaldi and Weil. The questionaire also revealed a 1.8 million dollar shrinkage in FID's net capital position between April and June and a substantial volume of dividends which had failed to be received. At a meeting attended by the plaintiffs Fraiman, Petrillo and Weil, this questionaire was reviewed and it was pointed out that the 9-10 million dollars in security short differences shown on the questionaire were probably considerably greater. Some time after the merger agreement had been signed in principle, but before its effectuation, Weil, at Kohns' request, visited FID and talked to some of its key personnel. Kohns wanted Weil to take

charge of the back office of the merged firm since apparently the Glore partner whom he had hoped to take on this responsibility had decided not to join the merged firm. After the visit which confirmed Weil's estimate of the chaotic conditon of the back office, he remained negative and refused to join plaintiffs in the merged operation.

A member of the staff of Lee B. Arning, Vice President for Operations of NYSE, advised that the merger be prohibited or delayed. Frank Dominach, Jr., in a memorandum dated June 24, 1970, to Arning indicated that based on an analysis of special operations questionaires of FID, Hirsch and Glore during 1970 and on updated information secured on the telephone, it was his recommendation that the merger be delayed until assurances of additional capital were provided and the operations exposure at FID was completely identified and reduced. The memorandum stated that FID had not made sufficient progress in clearing up its security differences; that between January 31, 1970, and May 31, 1970, FID's security long differences had been reduced from 11.6 million to only 8.8, and its short differences had been reduced from 9.9 million to only 9.65 million. The memo discussed FID's 1970 per month losses, its 17,000% net capital ratio as of June 11th; the $3.4 million combined losses of the three firms in

May and concluded with Dominach's view that the merged firm would be in net capital violation by November. Mr. Arning refused to follow Dominach's suggestion and allowed the merger to go forward.

Plaintiffs knew of the two NYSE censures and fines leveled against FID in 1969 and 1970; they were aware of FID's back office problems. They were aware, through newspaper accounts, of FID's reported operating losses in 1969 and were aware through examination of the latest operations questionaire by Garibaldi when negotiations resumed in May, 1970, that the 1969 losses were continuing and at an accelerated rate. Plaintiffs assert that they did not know of FID's violation of net capital requirements in the summer and fall of 1969, that FID had l quidated security long differences at the December 16, 1969 suggestion of Bishop of NYSE, or of Dominach's June, 1970 memorandum suggesting that the merger not be allowed to go forward.

Discussion

It is very difficult for me to understand on what conceivable legal basis plaintiffs assert a claim of liability against either defendant. There is nothing in the record to indicate that the NYSE participated in any way (advised, encouraged or brought the parties together) in the merger negotiations. Affirmative misrepresentation, therefore, appears not to be a facet of plaintiffs' claim against NYSE.

The latter, of course, knew what was going on, and it could have discouraged consummation of the merger or delayed it, but NYSE officials would have had to have been convinced that such interference was in the public interest. On June 24, 1970, Frank Dominach, a member of the staff of Lee [illegible]. Arning, NYSE Vice President for Operations, urged that the merger be delayed until there were assurances of additional capital for the merged firm and the operations exposure at FID had been fully designated and reduced. Arning and other officials at NYSE with power of decision could have accepted Dominach's evaluation and postponed or barred the merger. On the contrary, these officials rejected Dominach's view and allowed the merger to go

forward. Failure of NYSE officials, without more, to adopt and act upon the views of a member of the staff can hardly be classified as a misrepresentation or concealment under any circumstances. This was purely a matter of judgment and nothing has been adduced in this trial record to show that the judgmental determination by Dominach's superiors was not made in good faith. Moreover, Dominach's memorandum cannot be read, as plaintiffs seem to claim, that the merger should have been prohibited or delayed solely because of FID's weaknesses alone. Dominach felt that the poor 1970 performance of Hirsch and Glore as well as FID made the merger of questionable viability. He felt that neither FID, Glore or Hirsch were bringing enough demonstrable strength to the merged firm to warrant hope for a successful venture. The Dominach memorandum affords plaintiffs no foundation upon which to assert a 10b claim.

The NYSE had knowledge of FID net capital compliance problems and its back office weaknesses as well, but it has no obligation that I have been able to discover requiring that it disclose to member firms in merger negotiations whatever it knew about the firms in question. While a 10b violation may occur by an affirmative misrepresentation or by an omission that a reasonable man would consider important to his decision--

in this instance to consummate the merger--see List v. Fashion Park, Inc., 340 F. 2d 457, 462 (2d Cir.), cert. denied, 382 U.S. 811 (1965), or might have considered important to that determination, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), mere inaction absent a duty to act does not suffice, see Lanza v. Drexel & Co., 479 F. 2d 1277 (2d Cir. 1973) (en banc); Wessel v. Buhler, 437 F. 2d 279 (9th Cir. 1971).

On the basis of this record, there is little doubt that NYSE was fully entitled to conclude that plaintiffs had fully informed themselves concerning all the facts relating to FID and had decided to go forward with the merger, fully advised of all the facts. Each of the plaintiffs, as a partner in the proposed merger, filed an application with NYSE for the approval of the NYSE Board of Governors. The application of each plaintiff expressly represented that the application was not being made in reliance upon NYSE surveillance of FID; that each had made its own investigation including the latest certified audit of H&S dated September 30, 1969, and a March 31, 1970 computation of FID net capital; that each was not relying upon NYSE to provide information and each agreed that NYSE had no

responsibility to disclose to him any information concerning FID. There was no effort at trial by plaintiffs to disclaim these representations.

The application is a standard form, and while there might arguably be some basis for ignoring those representations if plaintiffs were naive or unknowing or strangers to the Wall Street brokerage community, but as knowledgeable, sophisticated businessmen, no reason has been shown as to why they should not be held to those representations. See Pollak v. Eastman Dillon, [1974-1975 Transfer Binder] CCH Sec. Fed.Sec.L.Rep. ¶94,987 (S.D.N.Y. 1975).

The current condition of FID was fully disclosed to plaintiffs or their representatives. Garibaldi and Weil apparently made as full an investigation of FID as they considered necessary. At the time, they were fully conversant with FID's current financial conditions and its back-office problems. Whatever Garibaldi asked for from FID he received, and there was no evidence that anything was withheld. Concealment, failure to disclose, or to misrepresent as to FID's conditions contemporaneous to the merger does not appear to be the issue. Reliance here for NYSE's claimed liability is plaintiffs' unawareness that in September, 1969, NYSE had calculated FID net capital ratios and found them

not to have been in compliance with Rule 325, and that in December, 1969, pursuant to suggestions of NYSE Vice President Bishop, FID improved its net capital position by liquidating roughly six million dollars of its security long differences.

It is true that NYSE did not directly inform plaintiffs concerning its 1969 calculations of FID's net capital ratios, or advise them of the December meeting. Assuming arguendo that these are omissions which NYSE had a duty to disclose, the omissions or misrepresentations must be, as noted, material, see List v. Fashion Park, Inc., supra; Mills v. Electric Auto-Lite Co., supra, and further the plaintiffs have to establish reliance on the misrepresentation in comniting themselves to the merger. Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F. 2d 833 (2d Cir. 1968) (en banc), cert. denied, 404 U.S. 1005 (1971). The action of plaintiffs and their representatives during the negotiations belie any contention that FID conditions in 1969 would have been or might have been material to plaintiffs' decision to join forces with FID in July, 1970, or that they placed any reliance on any supposed understanding of FID's 1969 status based upon any misrepresentation to or concealment from them by NYSE in making the decision to go forward with the merger plan.

Neither the plaintiffs, nor their representatives Weil or Garibaldi, sought any 1969 data. Garibaldi was concerned with FID's current status, not with the past. He sought to evaluate the pros and cons of the merger based upon the most up-to-date information FID could supply. Had the information of the NYSE censure and fine of FID in 1969 and 1970 been withheld or not known to plaintiffs, a more impressive case for considering the 1969 information material would be made. The record clearly establishes that the plaintiffs were informed of the censure and fines. They knew that FID had serious back-office problems--indeed Kohns felt better about the prospects of merger when the talks were renewed and Glore became a party to the merger negotiations because he hoped one of Glore's partners would take over the back office of the merged firm. When tha partner apparently became unavailable, Kohns sought to interest Weil and Garibaldi in staying on with the merged firm so that they could take over the back office or make it an efficient arm of the merged operations.

Moreover, Fraiman, one of the plaintiff's partners, was a member of the Board of Governors of NYSE. The record discloses that he kept plaintiffs up to date with what he learned as a member of the NYSE Board. Therefore, it is doubly clear that plaintiffs could readily have gained access to information

concerning FID's 1969 status, even that gathered in the NYSE investigation, if they had wished. Fraiman was on the committee negotiating the merger, so that he would surely have been sensitized to obtain 1969 data if it had been regarded as material or if such data was to be a basis for plaintiffs' decision. The inescapable conclusion is that the plaintiffs did not regard the 1969 data on which their claims are based in this lawsuit as being of consequence to their decision. While it may well be that the plaintiffs may make a valid claim for liability against NYSE although they in fact focused upon other matters in reaching their determination if what was withheld was relied upon and might have been material to their decision, see Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-154 (1972), the plaintiffs could have and would have secured this information if they had considered it of consequence. They thus must fail on another ground since they did not exercise the due care which can be reasonably expected of sophisticated businessmen of plaintiffs' calibre. Pollack v. Eastman Dillon, supra; Jackson v. Oppenheim, ____ F. Supp. ____ [1974-1975 Transfer Binder] CCH Fed. Sec.L.Rep. ¶94,894 (S.D.N.Y. 1974). They did not consider any 1969 data important at the time and no reason exists to allow them to breathe materiality and reliance into such information now. See Titan Group, Inc. v. Faggen, 513 F. 2d

234, 238-239 (2d Cir. 1975). Plaintiffs wanted this merger to go forward. They hoped that the merged organization would be a successful venture. In deciding to merge with FID, plaintiffs understandably overestimated Edmund Dupont's ability to secure sufficient financial help from Wilmington to weather any perils the merged firm might encounter. They also underestimated the evident weakness of FID, which Garibaldi and Weil had pointed out to them. There was no non-disclosure or otherwise any 10b fault on NYSE's part. The events merely add up to an error in decision which wise business men often make and must live with.

The case against H&S can be disposed of summarily. H&S was under no obligation to disclose any information to plaintiffs concerning their 1969 audit or net capital computations of FID. H&S was not acting in any professional consultative capacity to plaintiffs in respect of the merger. It is true that Petrillo was at a meeting with plaintiffs when Garibaldi discussed his analysis of FID and raised the questions he wanted FID to answer. Petrillo was asked his views about the proposed merger and apparently commented favorably. Petrillo, however, seems to have been acting personally and not in the capacity of a partner in H&S. There is no evidence of any contract or agreement

with H&S or with Petrillo for either to undertake any tasks for plaintiffs in connection with the merger. Moreover, it has long been the rule of this Circuit that intent to defraud, or willful or reckless disregard of the truth is an essential element of liability under 10b-5, Lanza v. Drexel & Co., supra, 479 F. 2d at 1301, 1306. The correctness of that view can no longer be doubted in view of the adoption by the United States Supreme Court in Ernst & Ernst v. Hochfelder, _____ U.S. _____, 96 S.Ct. 1375 (1976), of the same standard. No proof sufficient to bring H&S within the Ernst formula has been shown on this record.

Accordingly, the complaint is dismissed and judgment is awarded to NYSE and H&S, and all cross-claims are dismissed.

SETTLE ORDER.

Dated: New York, New York
June 30, 1976

Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

Rec'd from [illegible] DPE

J

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F. I. duPONT, GLORE FORGAN & CO.
(formerly Francis I. duPont & Co.)

THIS AGREEMENT, made as of the close of business on the 2nd day of July, 1970, by and among ARCHIE E. ALBRIGHT, MICHAEL J. CASSIDY, HARRY W. COLMERY, JR., CARLISLE C. CROSBY, JR., KINGMAN DOUGLASS, JR., DAVID B. DUVAL, ROBERT J. FRAIMAN, ROBERT W. GALE, BASIL B. GALLAGHER, ROBERT H. GLORE, SAMUEL A. HARTWELL, JR., CHARLES J. HODGE, DANIEL D. JACKSON, ROBERT P. JOHNSON, ALBERT E. KOGLER, JANE R. LARKIN, FREDERICK W. LEICH, JAMES H. LYNCH, JR., DONALD J. MEYER, EDWARD A. MORGAN, III, WALTER A. RAMSEY, DONALD ROYCE, JR., BENJAMIN F. SANFORD, GUIDO [illegible]CLAFANI, MARSHALL SPECTOR and LOUIS J. ZIPPO, parties of the first part, RANDOLPH GUGGENHEIMER, JR., SEYMOUR KATZENSTEIN, PAUL L. KOHNS, MARSHALL S. MUNDHEIM and MYRON SIMONS, parties of the second part, MILTON C. ALTENBERGER, JOHN F. FENNELLY, J. RUSSELL FORGAN, HOWARD C. HIRSCH, CHARLOTTE KUX and ESTATE OF HARRIET GRACE SHELARE, parties of the third part, CHARLES W. FAY, MAURICE GLINERT, CHARLES M. HALE, GERALD T. HODGE, CLIFFORD HOLLANDER, ANDRE LORD, RICHARD W. MILLAR, DANIEL T. PIERCE, ELY ROSS, AUBREY E. SAMPSON, ARTHUR H. SHAFFER and MILTON C. ZAIDENBERG, parties of the fourth part, and all of the other present

partners of F. I. duPONT, GLORE FORGAN & CO., parties of the fifth part,

W I T N E S S E T H :

WHEREAS the parties of the fifth part have been doing business as partners under the firm name of Francis I. duPont & Co., pursuant to Articles of Limited Partnership dated January 1, 1969, as amended from time to time (said Articles as so amended being hereinafter called the Partnership Articles); and

WHEREAS, it is desired by the parties to this agreement that the Partnership Articles be amended to reflect the following:

(a) The admission of the parties of the first part as general partners.

(b) The admission of the parties of the second part as general and limited partners.

(c) The admission of the parties of the third part as limited partners.

(d) The admission of the parties of the fourth part as special partners.

(e) Changes in general and limited capital.

(f) Changes in the division of profits and losses.

(g) Changes in additional payments to limited and special partners.

(h) Changes in stock exchange memberships.

(i) The establishment of a Board of Directing Partners, a Finance Committee and an Executive Committee and the appointment of a Managing Director.

(j) Changes in the Special Committee of the Partners.

(k) The continuation of the business of the partnership under the firm name of F. I. duPont, Glore Forgan & Co.

(l) The restatement of the Partnership Articles.

NOW, THEREFORE, it is agreed as follows:

FIRST: Archie E. Albright, Michael J. Cassidy, Harry W. Colmery, Jr., Carlisle C. Crosby, Jr., Kingman Douglass, Jr., David B. Duval, Robert J. Fraiman, Robert W. Gale, Basil B. Gallagher, Robert H. Glore, Samuel A. Hartwell, Jr., Charles J. Hodge, Daniel D. Jackson, Robert P. Johnson, Albert E. Kogler, Jane R. Larkin, Frederick W. Leich, James H. Lynch, Jr., Donald J. Meyer, Edward A. Morgan, III, Walter A. Ramsey, Donald Royce, Jr., Benjamin F. Sanford, Guido Sclafani, Marshall Spector and Louis J. Zippo became general partners effective as of the close of business on July 2, 1970.

SECOND: Randolph Guggenheimer, Jr., Seymour Katzenstein, Paul L. Kohns, Marshall S. Mundheim and Myron Simons became general and limited partners effective as of the close of business on July 2, 1970.

THIRD: Milton C. Altenberger, John F. Fennelly , J. Russell Forgan, Howard C. Hirsch, Charlotte Kux and Estate of Harriet Grace Shelare

became limited partners effective as of the close of business on July 2, 1970.

FOURTH: Charles W. Fay, Maurice Glinert, Charles T. Hale, Gerald T. Hodge, Clifford Hollander, Andre Lord, Richard W. Millar, Daniel T. Pierce, Ely Ross, Aubrey E. Sampson, Arthur H. Shaffer and Milton C. Zaidenberg became special partners effective as of the close of business on July 2, 1970.

FIFTH: The number of units of general capital held by the several general partners shall be as set forth in the schedule attached hereto and made a part hereof entitled "General Capital."

SIXTH: The limited capital contributions to the partnership of the limited and special partners shall be the amounts described in the schedule attached hereto and made a part hereof entitled "Limited Capital."

SEVENTH: The net profits and losses of the partnership shall be shared in the manner provided in the schedule attached hereto and made a part hereof entitled "Division of Profits."

EIGHTH: The limited and/or special partners listed in the schedule attached hereto and made a part hereof entitled "Additional Payments to Limited and Special Partners" shall receive the amounts therein set forth.

NINTH: The partnership shall be represented by the persons listed in the schedule attached hereto and made a part hereof entitled "Exchange Memberships" upon the floors of the exchanges therein indicated.

TENTH: The Board of Directing Partners, the Executive Committee and the Finance Committee shall consist of the persons named in the schedule attached hereto and made a part hereof entitled "Committees" and shall have the Chairmen and Vice Chairmen so designated in said schedule and the Managing Director shall be the person so designated in said schedule.

ELEVENTH: The Special Committee of the Partners shall consist of the persons named in the schedule attached hereto and made a part hereof entitled "Special Committee of the Partners."

TWELFTH: The parties shall continue the business of the partnership under the firm name of F. I. duPont, Glore Forgan & Co. and pursuant to the provisions of the document entitled "Articles of Limited Partnership of F. I. duPont, Glore Forgan & Co., July 2, 1970, attached hereto and made a part hereof.

IN WITNESS WHEREOF the parties hereto have executed this instrument as of the day and year first above written.

s/ Archie E. Albright
Archie E. Albright

s/ Michael J. Cassidy
Michael J. Cassidy

s/ Harry W. Colmery, Jr.
Harry W. Colmery, Jr.

s/ Carlisle C. Crosby, Jr.
Carlisle C. Crosby, Jr.

s/ Kingman Douglass, Jr.
Kingman Douglass, Jr.

s/ David B. Duval
David B. Duval

s/ Robert J. Fraiman
Robert J. Fraiman

s/ Robert W. Gale
Robert W. Gale

s/ Basil B. Gallagher
Basil B. Gallagher

s/ Robert H. Glore
Robert H. Glore

s/ Samuel A. Hartwell, Jr.
Samuel A. Hartwell, Jr.

s/ Charles J. Hodge
Charles J. Hodge

s/ Daniel D. Jackson
Daniel D. Jackson

s/ Robert P. Johnson
Robert P. Johnson

s/ Albert E. Kogler
Albert E. Kogler

s/ Jane R. Larkin
Jane R. Larkin

s/ Frederick W. Leich
Frederick W. Leich

s/ James H. Lynch, Jr.
James H. Lynch, Jr.

s/ Donald J. Meyer
Donald J. Meyer

s/ Edward A. Morgan, III
Edward A. Morgan, III

s/ Walter A. Ramsey
Walter A. Ramsey

s/ Donald Royce, Jr.
Donald Royce, Jr.

s/ Benjamin F. Sanford
Benjamin F. Sanford

s/ Guido Sclafani
Guido Sclafani

s/ Marshall Spector
Marshall Spector

s/ Louis J. Zippo
Louis J. Zippo

Parties of the First Part

s/ Randolph Guggenheimer, Jr.
Randolph Guggenheimer, Jr.

s/ Seymour Katzenstein
Seymour Katzenstein

s/ Paul L. Kohns
Paul L. Kohns

s/ Marshall S. Mundheim
Marshall S. Mundheim

s/ Myron Simons
Myron Simons

Parties of the Second Part

s/ Milton C. Altenberger
Milton C. Altenberger

s/ John F. Fennelly
John F. Fennelly

s/ J. Russell Forgan
J. Russell Forgan

SPECIAL COMMITTEE OF THE PARTNERS
(Under Article TWENTIETH)

Edmond duPont

Wallace C. Latour

Edwin B. Peterson

GENERAL PARTNERS

s/ Edmond duPont
Edmond duPont

s/ John W. Allyn
John W. Allyn

s/ John J. Trask
John J. Trask

s/ James M. King, Jr.
James M. King, Jr.

s/ Austin J. Lyons
Austin J. Lyons

s/ Harry A. Pujals
Harry A. Pujals

s/ Edwin B. Peterson
Edwin B. Peterson

s/ Harold A. Rousselot
Harold A. Rousselot

s/ Gordon R. Foote
Gordon R. Foote

s/ Milton A. Speicher
Milton A. Speicher

s/ Gough W. Thompson, Jr.
Gough W. Thompson, Jr.

s/ Willis B. Hamilton
Willis B. Hamilton

s/ Wallace C. Latour
Wallace C. Latour

s/ Thomas W. Thompson
Thomas W. Thompson

s/ Howard C. Hirsch
Howard C. Hirsch

s/ Charlotte Kux
Charlotte Kux

s/ Jesse Sobol
Jesse Sobol, Executor, Estate of Harriet Grace Shelare

Parties of the Third Part

s/ Charles W. Fay
Charles W. Fay

s/ Maurice Glinert
Maurice Glinert

s/ Charles M. Hale
Charles M. Hale

s/ Gerald T. Hodge
Gerald T. Hodge

s/ Clifford Hollander
Clifford Hollander

s/ Andre Lord
Andre Lord

s/ Richard W. Millar
Richard W. Millar

s/ Daniel T. Pierce
Daniel T. Pierce

s/ Ely Ross
Ely Ross

s/ Aubrey E. Sampson
Aubrey E. Sampson

s/ Arthur H. Shaffer
Arthur H. Shaffer

s/ Milton C. Zaidenberg
Milton C. Zaidenberg

Parties of the Fourth Part

s/ Stanton W. Frederick, Sr.
Stanton W. Frederick, Sr.

s/ Peter R. duPont
Peter R. duPont

s/ Andrew I. Namm
Andrew I. Namm

s/ Robert J. Monahar
Robert J. Monahan

s/ Mark J. Appleman
Mark J. Appleman

s/ Alfred Rhett duPont, Jr.
Alfred Rhett duPont, Jr.

s/ C. Kelly Reynolds, Jr.
C. Kelly Reynolds, Jr.

s/ Llewellyn P. Young
Llewellyn P. Young

s/ Arthur C. Person
Arthur C. Person

s/ James J. Hughes, Jr.
James J. Hughes, Jr.

s/ Douglas L. Ayer
Douglas L. Ayer

s/ William N. Allyn
William N. Allyn

s/ William W. Madden
William W. Madden

s/ William A. Victor
William A. Victor

s/ Robert C. Diserens
Robert C. Diserens

s/ Warren Ackerman, Jr.
Warren Ackerman, Jr.

s/ Alfred J. Rauschman
Alfred J. Rauschman

s/ Donald Mutterperl
Donald Mutterperl

s/ Samuel A. Gay
Samuel A. Gay

s/ Rudolf Smutny
Rudolf Smutny

s/ Edmond R. duPont
Edmond R. duPont

s/ C. Thomas Steffens
C. Thomas Steffens

s/ H. James Toffey
H. James Toffey

s/ Phillip R. Clark
Phillip R. Clark

s/ Charles J. Jordan
Charles J. Jordan

s/ Jerome D. Rosenstein
Jerome D. Rosenstein

s/ Ralph W. Williams, Jr.
Ralph W. Williams, Jr.

s/ John C. Clark
John C. Clark

s/ Edward E. Moritt
Edward E. Moritt

LIMITED PARTNERS

s/ Edmond duPont
Edmond duPont

s/ A. Rhett duPont
A. Rhett duPont

s/ Edmond duPont
Edmond duPont as trustee under deed of trust of Benjamin B. duPont dated April 15, 1960

and

s/ A. Rhett duPont
A. Rhett duPont as trustee under deed of trust of Benjamin B. duPont dated April 15, 1960

s/ Julia W. Campbell
Julia W. Campbell

s/ Mary L. duPont
Mary L. duPont

s/ Clarence M. Galvin
Clarence M. Galvin

s/ Frank Hegner
Frank Hegner

s/ Thomas A. Lewis
Thomas A. Lewis

s/ William Turnbull
William Turnbull

s/ Harry G. Williams
Harry G. Williams

s/ Williamson Pell
Williamson Pell

s/ Fred'k Lewis, Jr.
Fred'k Lewis, Jr.

s/ John H. Riley
John H. Riley

s/ Emile F. duPont
Emile F. duPont, Trustee under deed of trust of Gough W. Thompson, Jr. dated December 31, 1967

s/ John A. FitzRandolph
John A. FitzRandolph

s/ Edna M. Kendall
Edna M. Kendall

s/ Nat Sandler
Nat Sandler

s/ Charles Moran, Jr.
Charles Moran, Jr.

SPECIAL PARTNERS

s/ Edward A. White
Edward A. White

s/ Hugh C. Wallace
Hugh C. Wallace

s/ Henry Stefany
Henry Stefany

s/ Donald L. Graham
Donald L. Graham

s/ A. Philip Megna
A. Philip Megna

s/ Harold G. Edelstein
Harold G. Edelstein

s/ John S. French
John S. French

s/ William R. Humphreys, Jr.
William R. Humphreys, Jr.

s/ Robert H. Anderson
Robert H. Anderson

s/ George W. Elwell
George W. Elwell

s/ George W. Fellows
George W. Fellows

s/ Roger D. Gabbert
Roger D. Gabbert

s/ Stephen S. Head
Stephen S. Head

s/ Phil A. Petitt
Phil A. Petitt

s/ Donald D. Farinella
Donald D. Farinella

s/ Charles F. Benzel, Jr.
Charles F. Benzel, Jr.

s/ Jerry P. Oakley
Jerry P. Oakley

s/ Robert L. Carpenter
Robert L. Carpenter

s/ Norman L. Padgett
Norman L. Padgett

s/ Howard G. Berg
Howard G. Berg

s/ Don W. Couch
Don W. Couch

s/ Joseph R. Dugan
Joseph R. Dugan

s/ Robert C. Dunwoody
Robert C. Dunwoody

s/ Howard B. Eskin
Howard B. Eskin

s/ Thomas Franges
Thomas Franges

s/ Bill Gardner
Bill Gardner

s/ Robert D. Gordon
Robert D. Gordon

s/ R. Wayne Homans
R. Wayne Homans

s/ Duncan G. Jensby
Duncan G. Jensby

s/ Richard J. McDonald
Richard J. McDonald

s/ Robert W. Plenge
Robert W. Plenge

s/ George R. Smith
George R. Smith

s/ Herbert E. Van Blarcum
Herbert E. Van Blarcum

s/ L. Donald Yarkin
L. Donald Yarkin

Parties of the Fifth Part

GENERAL CAPITAL -
Close of Business,
July 2, 1970

	Voting Units	Non-Voting Units	Total Units
Edmond duPont	493	2,239	2,732
John J. Trask	5	107	112
James M. King, Jr.	20	286	306
Austin J. Lyons	4	96	100
Harry A. Pujals	4	96	100
Edwin B. Peterson	39	162	201
Harold A. Rousselot	29	311	340
Gordon R. Foote	6	94	100
Milton A. Speicher	17	184	201
Gough W. Thompson, Jr.	16	406	422
Wallace C. Latour	36	189	225
Thomas W. Thompson	33	168	201
Stanton W. Frederick, Sr.	5	79	84
Peter R. duPont	16	382	398
Andrew I. Namm	8	82	90
John W. Allyn	116	1,144	1,260
Willis B. Hamilton	8	128	136
Robert J. Monahan	4	77	81
Mark J. Appleman	4	86	90
Alfred R. duPont, Jr.	12	297	309
C. Kelly Reynolds, Jr.	4	61	65
Llewellyn P. Young	4	77	81
Arthur C. Person	4	77	81
James J. Hughes, Jr.	4	86	90

GENERAL CAPITAL -
Close of Business,
July 2, 1970
(Continued)

	Voting Units	Non-Voting Units	Total Units
Douglas L. Ayer	4	68	72
William N. Allyn	4	36	40
William W. Madden	4	36	40
William A. Victor	4	48	52
Robert C. Diserens	4	36	40
Warren Ackerman, Jr.	4	86	90
Alfred J. Rauschman	4	48	52
Donald Mutterperl	4	41	45
Samuel A. Gay	29	172	201
Rudolf Smutny, Sr.	4	88	92
Edmond R. duPont	12	295	307
C. Thomas Steffens	4	63	67
H. James Toffey	4	63	67
Phillip R. Clark	4	41	45
Charles J. Jordan	4	41	45
Jerome D. Rosenstein	4	41	45
Ralph W. Williams, Jr.	4	41	45
Edward E. Moritt	4	36	40
John C. Clark	4	16	20
Paul L. Kohns	35	272	307
Marshall S. Mundheim	33	274	307
Seymour Katzenstein	6	32	38
Robert J. Fraiman	26	204	230
Myron Simons	5	35	40

GENERAL CAPITAL -
Close of Business,
July 2, 1970
(Continued)

	Voting Units	Non-Voting Units	Total Units
Marshall Spector	4	16	20
Jane R. Larkin	4	36	40
Guido Sclafani	4	26	30
Randolph Guggenheimer, Jr.	4	16	20
Edward A. Morgan, III	4	16	20
Archie E. Albright	37	409	446
Charles J. Hodge	25	269	294
Harry W. Colmery, Jr.	25	263	288
Kingman Douglass, Jr.	25	263	288
Daniel D. Jackson	25	263	288
James H. Lynch, Jr.	15	158	173
Louis J. Zippo	4	42	46
David B. Duval	4	37	41
Albert E. Kogler	4	25	29
Walter A. Ramsey	4	25	29
Michael J. Cassidy	4	31	35
Carlisle C. Crosby, Jr.	4	42	46
Basil B. Gallagher	4	31	35
Robert H. Glore	7	91	98
Samuel A. Hartwell, Jr.	15	158	173
Frederick W. Leich	7	108	115
Donald J. Meyer	4	37	41

GENERAL CAPITAL -
Close of Business,
July 2, 1970
(Continued)

	Voting Units	Non-Voting Units	Total Units
Donald Royce, Jr.	15	158	173
Benjamin F. Sanford	4	37	41
Robert W. Gale	4	31	35
Robert P. Johnson	4	48	52
TOTAL	1,365	11,663	13,028

DIVISION OF PROFITS -
Close of Business,
July 2, 1970

(The p[illegible] of the firm are prorated among the [illegible]ing units of general capital. Each gen[illegible] partner is entitled to receive the sha[illegible] of the profits indicated below.)

Edmond duPont	2,732/13,028
Jonn J. Trask	112/13,028
James H. King, Jr.	306/13,028
Austin J. Lyons	100/13,028
Harry A. Pujals	100/13,028
Edwin B. Peterson	201/13,028
Harold A. Rousselot	340/13,028
Gordon R. Foote	100/13,028
Milton A. Speicher	201/13,028
Gough W. Thomoson, Jr.	422/13,028
Wallace C. Latour	225/13,028
Thomas W. Thompson	201/13,028
Stanton W. Frederick, Sr.	84/13,028
Peter R. duPont	398/13,028
Andrew I. Namm	90/13,028
John W. Allyn	1,260/13,028
Willis B. Hamilton	136/13,028
Robert J. Monahan	81/13,028
Mark J. Appleman	90/13,028
Alfred R. duPont, Jr.	309/13,028
C. Kelly Reynolds, Jr.	65/13,028
Llewellyn P. Young	81/13,028

DIVISION OF PROFITS -
Close of Business,
July 2, 1970
(Continued)

Arthur C. Person	81/13,028
James J. Hughes, Jr.	90/13,028
Douglas L. Ayer	72/13,028
William N. Allyn	40/13,028
William W. Madden	40/13,028
William A. Victor	52/13,028
Robert C. Dinerens	40/13,028
Warren Ackerman, Jr.(1)	90/13,028
Alfred J. Rauschman(1)	52/13,028
Donald Mutterperl(1)	45/13,028
Samuel A. Gay(1)	201/13,028
Rudolf Smutny, Sr.(1)	92/13,028
Edmond R. duPont(1)	307/13,028
C. Thomas Steffens(1)	67/13,028
H. James Toffey(1)	67/13,028
Phillip R. Clark	45/13,028
Charles J. Jordan	45/13,028
Jerome D. Rosenstein	45/13,028
Ralph W. Williams, Jr.	45/13,028
Edward E. Moritt	40/13,028
John C. Clark(2)	20/13,028
Paul L. Kohns(3)	307/13,028
Marshall S. Mundheim(3)	307/13,028
Seymour Katzenstein(3)	38/13,028
Robert J. Fraiman(3)	230/13,028

DIVISION OF PROFITS -
Close of Business,
July 2, 1970
(Continued)

Myron Simons(3)	40/13,028
Marshall Spector(3)	20/13,028
Jane R. Larkin(3)	40/13,028
Guido Sclafani(3)	30/13,028
Randolph Guggenheimer, Jr.(3)	20/13,028
Edward A. Morgan, III(3)	20/13,028
Archie E. Albright(3)	446/13,028
Charles J. Hodge(3)	294/13,028
Harry W. Colmery, Jr.(3)	288/13,028
Kingman Douglass, Jr.(3)	288/13,028
Daniel D. Jackson(3)	288/13,028
James H. Lynch, Jr.(3)	173/13,028
Louis J. Zippo(3)	46/13,028
David B. Duval(3)	41/13,028
Albert E. Kogler(3)	29/13,028
Walter A. Ramsey(3)	29/13,028
Michael J. Cassidy(3)	35/13,028
Carlisle C. Crosby, Jr.(3)	46/13,028
Basil B. Gallagher(3)	35/13,028
Robert H. Glo[illegible](3)	98/13,028
Samuel A. Hartwell, Jr.(3)	173/13,028
Frederick W. Leich(3)	115/13,028
Donald J. Meyer(3)	41/13,028
Donald Royce, Jr.(3)	173/13,028

DIVISION OF PROFITS -
Close of Business,
July 2, 1970
(Continued)

Benjamin F. Sanford(3)		41/13,028
Robert W. Gale(3)		35/13,028
Robert P. Johnson(3)		52/13,028
	Total	13,028/13,028

NOTES:

(1) Such partner will not share in losses or recoveries taken into account after the date of his admission to the firm with respect to items which were included (or which if known would have been included) in the following accounts of Francis I. duPont & Co. as of December 31, 1969:

1. "Fail" problem accounts.
2. Short positions in stock dividend accounts.
3. Extraordinary debits in dividend receivable accounts.
4. The net losses of liquidations of over and under positions resulting from audit count.
5. Other undisclosed "suspense" account.

Such losses shall be borne, and such recoveries shared, by the partners who were general partners of Francis I. duPont & Co. on January 1, 1969, and in proportion to their interests in profits and losses as of such date.

(2) Such partner will not share in losses until May 1, 1972 or until the number of units of general capital held by him exceeds 20, whichever is earlier.

(3) Such partner:

(a) Will not share in losses or recoveries, including but not limited to losses or recoveries in the specific accounts listed in Note (1) above, taken into account after the

DIVISION OF PROFITS -
Close of Business,
July 2, 1970
(Continued)

NOTES: (Continued from p. 4)

date of his admission to the partnership which are attributable to operations of Francis I. duPont & Co. prior to the close of business on July 2, 1970.

(b) Will participate only to the extent of 20% of his share in net losses, if any (calculated so as to exclude the losses and recoveries referred to in the preceding paragraph), realized by the partnership during the period beginning as of the close of business on July 2, 1970 and ending as of the close of business on December 31, 1970. The balance of such losses shall be borne by the holders of the units of general capital which participate fully in the partnership's losses during such period.

(c) Will participate in profits of the firm only to the extent that such profits exceed the amount of the losses referred to in the preceding paragraph which are transferred pursuant to such paragraph.

(d) Effective as of the commencement of business on January 1, 1971, will, except to the extent otherwise hereinbefore provided, participate fully in future profits and losses.

LIMITED CAPITAL
Close of Business,
July 2, 1970

Name	Limited Contribution
Edmond duPont	Stocks listed on the New York Stock Exchange having an approximate market value on December 31, 1969 of $105,000.
A. Rhett duPont	United States Government bonds having an approximate market value on December 31, 1969 of $12,600, state, county and other municipal bonds having an approximate market value on said date of $792,150, stocks listed on the New York Stock Exchange having an approximate market value on said date of $2,012,244 unlisted securities having an approximate market value on said date of $71,170 and $43,623.03 cash, together with a Secured Capital Note for $215,000 secured by stocks listed on the New York Stock Exchange having an approximate market value on said date of $156,648, unlisted securities having an approximate market value on said date of $13,300 and $13,098.22 cash.
Edmond duPont and A. Rhett duPont, as trustees under deed of Benjamin B. duPont dated April 15, 1960	Stocks listed on the New York Stock Exchange having an approximate market value on December 31, 1969 of $417,564.
Julia W. Campbell	Stocks listed on the New York Stock Exchange having an approximate market value on December 31, 1969 of $764,582.
Harold G. Edelstein	$25,000 cash and Secured Capital Notes for $79,000 secured by state, county and other municipal bonds having an approximate market value on December 31 1969 of $56,600 and stocks listed on the New York Stock Exchange having an approximate market value on said date of $15,100.
Mary L. duPont	State, county and other municipal bonds having an approximate market value on December 31, 1969 of $640,700, stocks listed on the New York Stock Exchange having an approximate market value on said date of $488,000 and $915,727.71 cash.

LIMITED CAPITAL
Close of Business,
July 2, 1970
(Continued)

Name	Limited Contribution
Clarence M. Galvin	State, county and other municipal bonds having an approximate market value on December 31, 1969 to $26,750, stocks listed on the New York Stock Exchange having an approximate market value on said date of $213,651, stocks listed on the Midwest Stock Exchange having an approximate market value on said date of $8,652, unlisted securities having an approximate market value on said date of $10,350 and $205,200.01 cash.
Frank Hegner	Stocks listed on the the New York Stock Exchange having an approximate market value on December 31, 1969 of $135,360 and $241.09 cash.
Thomas A. Lewis	State, county and other municipal bonds having an approximate market value on December 31, 1969 of $229,500, stocks listed on the New York Stock Exchange having an approximate market value on said date of $536,284 and $501,469.18 cash.
William Turnbull	State, county and other municipal bonds having an approximate market value on December 31, 1969 of $67,100, stocks listed on the New York Stock Exchange having an approximate market value on said date of $156,347, unlisted securities having an approximate market value on said date of $32,100 and $3,919.24 cash.
Harry G. Williams	$1,000 cash.
Edward A. White	United States Government bonds having an approximate market value on December 31, 1969 of $6,720, state, county and other municipal bonds having an approximate market value on said date of $20,900, and stocks listed on the New York Stock Exchange having an approximate market value on said date of $700.

LIMITED CAPITAL
Close of Business,
July 2, 1970
(Continued)

Name	Limited Contribution
Hugh C. Wallace	$50,000 cash.
Williamson Pell, Jr.	Stocks listed on the New York Stock Exchange having an approximate market value on December 31, 1969 of $833,655 and $1.87 cash.
Emile F. duPont, as Trustee under trust indenture dated December 31, 1967	$235,000 cash.
Robert H. Anderson	$20,000 cash; $5,000 Note.
George W. Elwell	$25,000 cash.
George W. Fellows	$25,000 cash.
Roger D. Gabbert	$25,000 cash.
Stephen S. Mead	$20,000 cash; $5,000 Note.
Phil A. Petitt	$25,000 cash.
Charles F. Bensel, Jr.	$25,000 cash.
Jerry P. Oakley	$25,000 cash.
Donald D. Farinella	$20,000 cash; $5,000 Note.
Robert L. Carpenter	$25,000 cash.
Norman L. Padgett	$25,000 cash.
John S. French	$25,000 cash.
William R. Humphreys, Jr.	$25,000 cash.
Fred'k Lewis, Jr.	State, county and other municipal bonds having an approximate market value on December 31, 1969 of $432,550, stocks listed on the New York Stock Exchange having an approximate market value on said date of $402,211 and $940,275.86 cash.

LIMITED CAPITAL
Close of Business,
July 2, 1970
(Continued)

Name	Limited Contribution
Nat Sandler	State, county and other municipal bonds having an approximate market value on December 31, 1969 of $305,200; stocks listed on the New York Stock Exchange having an approximate market value on said date of $1,640,000.
Charles Moran, Jr.	State, county and other municipal bonds having an approximate market value on December 31, 1969 of $84,950, stocks listed on the New York Stock Exchange having an approximate market value on said date of $220,793, unlisted securities having an approximate market value on said date of $477,095 and $200,000 cash.
Henry Stefany	Stocks listed on the New York Stock Exchange having an approximate market value as of December 31, 1969 of $155,740; United States Government bonds having an approximate market value on said date of $32,000; unlisted securities having an approximate market value on said date of $24,435 and $115,000 cash, together with a Secured Capital Note for $77,000 secured by stocks listed on the New York Stock Exchange having an approximate market value on said date of $37,584; stocks listed on the American Stock Exchange having an approximate market value on said date of $2,050, unlisted securities having an approximate market value on said date of $18,150 and $5.72 cash.
John H. Riley	State, county and other municipal bonds having an approximate market value on December 31, 1969 of $54,400, unlisted securities having an approximate market value on said date of $16,000 and $526,201.38 cash.

LIMITED CAPITAL
Close of Business,
July 2, 1970
(Continued)

Name	Limited Contribution
Donald L. Graham	Stocks listed on the New York Stock Exchange having an approximate market value on December 31, 1969 of $267,202, unlisted securities having an approximate market value on said date of $106,117 and $82,277.33 cash.
John A. FitzRandolph	State, county and other municipal bonds having an approximate market value on December 31, 1969 of $3,800, stocks listed on the New York Stock Exchange having an approximate market value on said date of $628,680, unlisted securities having an approximate market value on said date of $13,200 and $45,472.50 cash.
Edna M. Kendall	United States Government bills having an approximate market value on December 31, 1969 of $57,600, state, county and other municipal bonds having an approximate market value on said date of $665,800 and $7,231.20 cash.
A. Philip Megna	Stocks listed on the New York Stock Exchange having an approximate market value on December 31, 1969 of $131,000, unlisted securities having an approximate market value on said date of $4,000 and $24,849.98 cash.
Howard G. Berg	$25,000 cash.
Don W. Couch	$25,000 cash.
Joseph R. Dugan	$25,000 cash.
Robert C. Dunwoody	$10,000 cash; $15,000 Note.

LIMITED CAPITAL
Close of Business,
July 2, 1970
(Continued)

Name	Limited Contribution
Howard B. Eskin	$10,000 cash; $15,000 Note.
Thomas Franges	$25,000 cash.
Bill Gardner	$25,000 cash.
Robert D. Gordon	$10,000 cash; $15,000 Note.
R. Wayne Homans	$25,000 cash.
Duncan G. Jensby	$25,000 cash.
Richard J. McDonald	$25,000 cash.
Robert W. Plenge	$25,000 cash.
George R. Smith	$25,000 cash.
Herbert E. Van Blarcum	$25,000 cash.
L. Donald Yarkin	$20,000 cash; $5,000 Note.
Paul L. Kohns	$593,000 cash.
Marshall S. Mundheim	$593,000 cash.
Seymour Katzenstein	$38,000 cash.
Myron Simons	$60,000 cash.
Charles M. Hale	$10,000 cash.
Randolph Guggenheimer, Jr.	$50,000 cash.
Howard C. Hirsch	$400,000 cash.
Andre Lord	$30,000 cash.
Ely Ross	$200,000 cash.
Daniel T. Pierce	$400,000 cash.

LIMITED CAPITAL
Close of Business,
July 2, 1970
(Continued)

Name	Limited Contribution
Clifford Hollander	$400,000 cash.
Milton C. Altenberger	$100,000 cash.
Milton C. Zaidenberg	$25,000 cash.
Arthur H. Shaffer	$250,000 cash.
Aubrey E. Sampson	$50,000 cash.
Maurice Glinert	$50,000 cash.
Estate of Harriet Grace Shelare	$50,000 cash.
Charlotte Kux	$25,000 cash.
John F. Fennelly	3,330.48 shares of Glore Forgan Staats Incorporated $7 Cumulative Preferred Stock with no readily ascertainable market value.
J. Russell Forgan	3,241.45 shares of Glore Forgan Staats Incorporated $7 Cumulative Preferred Stock with no readily ascertainable market value.
Charles W. Fay	1,623.57 shares of Glore Forgan Staats Incorporated $7 Cumulative Preferred Stock with no readily ascertainable market value.
Gerald T. Hodge	547.14 shares of Glore Forgan Staats Incorporated $7 Cumulative Preferred Stock with no readily ascertainable market value.
Richard W. Millar	3,900 shares of Glore Forgan Staats Incorporated $7 Cumulative Preferred Stock with no readily ascertainable market value.

ADDITIONAL PAYMENTS TO LIMITED AND SPECIAL PARTNERS
Close of Business, July 2, 1970

Article EIGHTH of the Articles of Limited Partnership provides that the partnership shall pay to each limited or special partner listed in this schedule the amount herein provided. Said amount shall be determined by applying the percentage set forth opposite the name of each partner listed below to the sum of (i) the net profits of the partnership (as defined in Article TENTH but before deduction of the amounts payable under this schedule) and (ii) the aggregate stated par value of all dividends received by the partnership in stock of a corporate affiliate declaring the same (other than dividends paid in the same class of stock with respect to which the distribution is made).

Name	Percentage
A. Rhett duPont(1)	3.653%
Hugh C. Wallace	.1%
Henry Stefany	.10%
Donald L. Graham	.10%
William R. Humphreys, Jr.	.15%
Harold G. Edelstein	.15%
John S. French	.15%
Emile F. duPont, Trustee	*.3525%
A. Philip Megna	.15%
Robert H. Anderson	.15%
George W. Elwell	.15%
George W. Fellows	.15%

* but not less than $1,175 per month.

ADDITIONAL PAYMENTS TO LIMITED AND SPECIAL PARTNERS
Close of Business, July 2, 1970
(Continued)

Name	Percentage
Roger D. Gabbert	.15%
Stephen S. Head	.15%
Phil A. Petitt	.15%
John A. FitzRandolph	.15%
Donald D. Farinella	.15%
Charles F. Benzel, Jr.	.15%
Jerry P. Oakley	.15%
Robert L. Carpenter	.15%
Norman L. Padgett	.15%
Charles Moran, Jr.	1.4743%
Howard G. Berg	.15%
Don W. Couch	.15%
Joseph R. Dugan	.10%
Robert C. Dunwoody	.10%
Howard B. Eskin	.15%
Thomas Franges	.10%
Bill Gardner	.10%
Robert D. Gordon	.15%
R. Wayne Homans	.15%
Duncan G. Jensby	.15%
Richard J. McDonald	.15%
Robert W. Plenge	.10%
George R. Smith	.15%
Herbert E. Van Blarcum	.15%
L. Donald Yarkin	.10%
J. Russell Forgan	.8977%

ADDITIONAL PAYMENTS TO LIMITED AND SPECIAL PARTNERS
Close of Business, July 2, 1970
(Continued)

Name	Percentage
John F. Fennelly	.2244%
Richard W. Millar	.2244%
Gerald T. Hodge	.0641%
Howard C. Hirsch	.625%
Paul L. Kohns	.9375%
Marshall S. Mundheim	.9375%

NOTE:

(1) The amount payable to A. Rhett duPont shall be determined by applying the percentage set forth opposite his name to the sum of (i) the net profits or losses of the partnership (as defined in Article TENTH but before deduction of the amounts payable under this schedule) and (ii) the net after-tax profits or losses of all its incorporated subsidiaries, with the one exception stated below.

For the purposes of this paragraph the computation of the amount of net profits of the partnership on which A. Rhett duPont is to be paid his agreed percentage shall be made as if the partnership's net profits and the corporate after-tax net profits of all of its incorporated subsidiaries had been computed on a consolidated basis. A. Rhett duPont shall be paid annually 3.653% of net profits so computed, regardless of whether or not any after-tax net profits of incorporated subsidiaries had been distributed.

The exception referred to above concerns Wall Street Leasing Corporation. So long as the business of that Corporation is not different in nature from its business as of January 1, 1970, A. Rhett duPont shall be entitled to receive 3.653% of its net profits only to the extent that said net profits are distributed to the firm in cash, stock or other form. If the business of Wall Street Leasing Corporation should be changed so as to be different from its business as of January 1, 1970, then from and after the date of such change this Corporation shall cease to be an exception and A. Rhett duPont shall receive 3.653% of the net profits of said Corporation whether or not the same are distributed.

EXCHANGE MEMBERSHIPS

	Name	Stock Exchange
*	Austin J. Lyons	New York
*	Alfred Rhett duPont, Jr.	New York
*	Harry A. Pujals	New York
*	Robert J. Monahan	New York
	Warren Ackerman, Jr.(1)	New York
	Edward E. Moritt(1)	New York
	Robert J. Fraiman(1)	New York
	Marshall Spector(1)	New York
*	Jane R. Larkin	New York
*	Louis J. Zippo	New York
*	David B. Duval	New York
*	Andrew I. Hamm	American
*	William M. Allyn	American
*	Robert C. Diserens	American
	Donald Mutterperl(1)	American
*	Michael J. Cassidy	American
	Albert E. Kogler(1)	Pacific Coast
*	Walter A. Ramsey	Midwest

* Membership purchased, directly or indirectly, with funds advanced by the partnership.

NOTE:

(1) Entitled to receive interest computed monthly at the rate fixed from time to time by the Finance Committee on the market value of such membership as reflected on the records of the exchange in which such membership is held.

COMMITTEES

Managing Director

Wallace C. Latour

Board of Directing Partners

J. Russell Forgan, Honorary Chairman.

Edmond duPont, Chairman;

Harold A. Rousselot, Vice Chairman;

Gough W. Thompson, Jr., Secretary;

Archie E. Albright;

John W. Allyn;

Harry W. Colmery, Jr.;

Kingman Douglass, Jr.;

Alfred R. duPont, Jr.;

Peter R. duPont;

Robert J. Fraiman;

Stanton W. Frederick, Sr.;

Charles J. Hodge;

Daniel D. Jackson;

Seymour Katzenstein;

Wallace C. Latour;

Paul L. Kohns;

Marshall S. Mundheim;

Andrew I. Namm;

Arthur C. Person;

Edwin B. Peterson;

Alfred J. Rauschman;

Milton A. Speicher; and

Thomas W. Thompson

Llewllyn P. Young, Counsel.

COMMITTEES
(Continued)

Finance Committee

Edmond duPont, Chairman;

Gough W. Thompson, Jr., Secretary;

Archie E. Albright;

John W. Allyn;

Charles J. Hodge;

Paul L. Kohns;

Wallace C. Latour; and

Milton A. Speicher.

Executive Committee

Archie E. Albright, Chairman;

James H. Lynch, Jr., Secretary;

Harry W. Colmery, Jr.;

Kingman Douglass, Jr.;

Peter R. duPont;

*Robert J. Fraiman;

Daniel D. Jackson;

Wallace C. Latour;

Edwin B. Peterson; and

Thomas W. Thompson.

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* Term expires July 3, 1973.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM,

Plaintiffs,

-against-

EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS & SELLS and NEW YORK STOCK EXCHANGE, INC.

Defendants.

----------x

NOTICE OF APPEAL

72 C.V 175
KLL

S I R S:

PLEASE TAKE NOTICE that Howard C. Hirsch, Paul L. Kohns and Marshall S. Mundheim, plaintiffs in the above-entitled action hereby appeal to the United States Court of Appeals for the Second Circuit from so much of the judgment and order entered in this action on August 3, 1976 as dismisses the amended complaint herein and from the order entered in this action on June 5, 1975 incorporated within the aforesaid judgment in accordance with the provisions of Rule 54(b) of the Federal Rules of Civil Procedure.

Yours, etc.

SHEA GOULD CLIMENKO & CASEY

By _____
(A Member of the Firm)
Attorneys for Plaintiffs
330 Madison Avenue
New York, New York 10017
(212) 661-3200

Dated: New York, New York
August 31, 1976

Q Mr. Lill, what is your profession?

A I am a certified public accountant.

Q How long have you been one?

A I have been with the firm 21 years. I have been certified for approximately 15 years.

Q Is Haskins & Sells one of the large accounting firms?

A Yes, it is.

Q Has it had considerable experience in securities firm work?

A Yes, it has.

Q Approximately how many partners in Haskins & Sells?

A Worldwide approximaely 400.

Q And in the New York office?

A Approximately 50.

Q Has your work been concentrated in the securities field?

A Yes, I have spent more than half of my total time in the securities industry.

Q Does that include audit work for member firms?

A Yes, it does.

Q Could you tell the Court a few of the major member firms for whom you have done audit work?

A I have done audit work for Merrill Lynch, Bache, E. F. Hutton, Francis I. duPont. Many others.

Q Was duPont a large firm at the time this case was involved, 1968, '69 and '70?

A Yes, it was.

Q One of the larger firms on Wall Street?

A Certainly one of the largest ten.

Q And principally in terms of branch offices and volume, is that correct?

A Yes.

MR. BROOKS: Your Honor, I am going to object to the question. I am not sure what Mr. Camhy means by volume.

THE COURT: Well, apparently Mr. Lill understood it.

MR. CAMHY: I was distinguishing between wealth or net worth and volume of business and size of operations.

THE COURT: All right.

Q How long prior to 1969 -- excuse me -- how long prior to June '70 had you been doing the duPont work? June 1970.

A Approximately one year.

Q Were you the partner in charge of the audit

of duPont which took place as at September 28, 1969?

A No, I was not.

Q What is the name of that partner?

A Harold Petrillo.

Q Is Mr. Petrillo active with Haskins & Sells?

A No, he is retired.

Q When did he retire?

A I believe it was sometime in 1970, '71.

Q Did you work on the 1969, September 28, 1969 audit?

A Yes, I did participate. That was the year of transition from Mr. Petrillo to myself.

Q So then you participated, if I may, as a responsible partner in that?

A I am not sure what you mean by a responsible --

Q Well, did you share a part of the responsibility with Mr. Petrillo?

A No, I did not. I was developing a background so I could take over that responsibility the following year.

Q Then you say Mr. Petrillo was the responsible partner?

A Yes, sir.

Q But you were a partner?

A The security count is made to a stock record which shows the accountability for the shares of stock that are said to be in each physical location. We count the securities in each physical location and agree it to the amount shown on the stock record. If the account is greater than the amount shown on the stock record it is referred to as a long difference. If the count is less than the amount shown on the stock record we refer to that as a short difference.

Q Going to the question of the stock record, does that record show what the firm's records indicate should be owned by the various customers or proprietary accounts or other positions in the firm?

A The stock record is a balanced record that shows on one side the ownership of the securities. That is referred to on the long side. And it shows on the other side the physical location of the securities, and that is referred to as the short side. A stock record should be in balance for each security.

Q When you measure the actual count against the stock record, and you find that you happen to have physically more shares or evidence of physical shares than are indicated for that particular stock, say AT&T or General Motors--- if you have more shares than your stock record indicate are

in various positions ownership accounts in the firm, do you say you have a long difference?

A Yes, sir.

THE COURT: He just told us that, Mr. Camhy. He just told us what that means. Do we have to have that in the record twice? He has explained it.

MR. CAMHY: Very well, your Honor.

I guess, your Honor, my problem is that when I hear it it sounds much more opaque than as I envision it.

THE COURT: I thought he explained it very well.

MR. CAMHY: May I proceed with one more question, please, your Honor, and I will try not to hammer too much at any of these.

Q If your record indicates you should have more of a particular issue than you find on your count do you find that a short difference?

A If we count less than the amount shown on the record?

Q Yes.

A It is a short difference.

Q Is it possible that all of your long differences -- that is, securities -- do not relate to your short differences? That is to say, is there any necessary relationship between securities differences long and securities differences short? Could they be different securities, different accounts,

representing different problems?

A Yes, sir.

MR. HYDE: I object to the form of the question. I find it hard to understand.

MR. CAMHY: The witness understood it.

MR. HYDE: If the witness understands, I withdraw the objection.

THE COURT: I think I understand, too.

MR. HYDE: I'm sorry.

Q So then it is possible to have a mass of securities long differences which conceivably might belong to certain people who don't even know, or might belong to yourseof, if you are the brokerage firm, and it is also possible at the same time to have a group of short differences wher people are entitled to securities which you physically don't have and which you may have to go out and get?

MR. HYDE: Your Honor, are we talking about the same stock or different stocks? That is one of the problems I have with the question.

THE COURT: I gather we are talking about the brokerage houses inventory of what stocks it has; what obligations it has, and so forth. We are not talking about the same stock, I gather.

MR. HYDE: Mr. Camhy's question, the difficulty

I have with it, is I don't know if he is referring to a single security such as AT&T or the aggregate of all the securities held by the firm.

THE COURT: I assumed that he was talking about the aggregate securities held by the firm.

MR. CAMHY: That's correct, your Honor.

THE COURT: If it means something else you better tell me.

MR. CAMHY: No, I am talking about what your Honor said.

A Now I am confused. It is possible to have a short difference in General Motors and a long difference in American Telephone that do not relate to each other.

Q Could you have a short difference in General Motors and a long difference in General Motors after a count in an audit?

A Not in the same position.

Q No, I didn't think so. So that if you had differences you would have securities which at least initially, prima facie, don't seem to relate to each other? That is your long differences would be a set of securities which you tried to match to each other and can't?

A That is possible. There are relationships. You may have a short difference in General Motors and a long

difference in General Electric which ultimately are determined to relate to each other.

Q Yes, I understand that.

A By the same token you may have long and short differences that are ultimately determined not to relate to each other.

Q But prima facie -- that is, starting with the difference which you have not been able to research to an identifiable mistake -- there is no apparent relation between your General Motors over and your General Electric under? They don't offset each other in any way?

A Prior to research, no.

Q Is it the purpose of research to try to identify the source of the difference?

A Yes, sir.

Q Is it the purpose of research to try to find the event or transaction which caused the error to occur and thereby adjust the error?

A Yes.

Q Mr. Lill, what is meant by the phrase used in many of these documents called "unsecured customer's accounts"?

A An unsecured customer account is an account which has a debit balance for money or a short position indicating that the account owes either money or stock,

THE COURT: The objection is overruled.

(Plaintiff's Exhibit 218 was received in evidence)

Q In doing your audit for 1969, year ended September 28, 1969, was it part of your audit function to inquire of the firm what --

MR. HYDE: I object to the form of the question. I think Mr. Camhy misspoke himself. He is speaking of an audit for the year ending September 28. There was no audit for the year ending. There was anaudit as of a particular date, not for a year ending.

MR. CAMHY: Excuse me,your Honor.

Q In connection with your audit as at September 28, 1969, was it part of your audit procedure to inquire of the firm what comments it received from the exchange as to its accounting practices or its compliance with ratio, and to request copies of any communications from the exchange which the firm had received?

THE COURT: Would you read that back, please?

(Question read)

A Our practice was to request any reports rendered by the New York Stock Exchange examiners on any

examinations performed during the period between audits.

Q Did they turn over to you those reports, and specifically Exhibit 135, premarked --

MR. CAMBY: I am sorry, may I read off a list of numbers, please.

Exhibits 137, 135, 226. I regret these delays, but we didpremark these exhibits.

THE COURT: That's all right.

Q Mr. Lill, would you look at Exhibit 137, please. Did you have access to that letter at thetime you did your audit?

A I probably did. I don't remember specifically, but I believe I would have.

Q And that letter refers to a report prepared by the examiners of the exchange as being enclosed with the letter.

Was that report, which is Exhibit 135, made available to you?

A I believe it was.

MR. CAMHY: Your Honor, on that basis I would like to offer these two.

MR. BROOKS: I don't have an objection to 135, your Honor, but I don't think there is a foundation for 137 coming in. I don't think Mr. Lill has said he saw that at the time.

THE COURT: I understood him to say that he thought he had.

MR. CAMHY: Yes.

MR. BROOKS: I thought he said he didn't know.

THE COURT: I didn't hear that.

MR. HYDE: I thought, your Honor, he said that he didn't remember having seen it but he assumed that he had. Whatever that --

THE COURT: What did you say, Mr. Lill?

MR. LILL: You can read it back but I said I believe that it would have been available to me I don't remember specifically receiving it.

THE COURT: All right. On that basis the objection is overruled. Plaintiffs' Exhibits 135 and 137 are both received.

(Plaintiffs' Exhibits 135 and 137 were received in evidence)

BY MR. CAMHY:

Q Turning to Plaintiffs' Exhibit 137, Mr. Lill, can you recall being made aware during your audit that the exchange had found a ratio based on unaudited figures as at June 30, 1969 of 22.93 per cent? Or in that area?

A I don't recall any --

MR. BROOKS: Your Honor, there is no point in that figure.

MR. CAMHY: Excuse me, 2000 --

Q Do you recall being made aware during your audit that the exchange had found them in the 2000 area ratio as at June 30, '69?

A I don't recall specifically.

Q Do you remember discussing with anybody that they had had ratio problems with the exchange the previous summer?

A I remember discussing ratio problems. There were continuous ratio problems during this period of time.

Q Including the months which preceded your audit?

A Yes.

Q Turning to page 3 of the letter, which is Exhibit 137, do you recall a problem of bulk segregation

is entieled to have an officer of the corporation, if he is representing the corporation I can't exclude him.

MR. CAMHY: He is going to be a witness on the same subject.

MR. BROOKS: Mr. Camhy has taken Mr. Bishop's deposition and he's inquired into this meeting. He has it pinned down as to what he is going to say.

THE COURT: Well, tha's besides the point. The point is he is an officer representing his corporation and I can't exclude him if you object. There is nothing I can do about that.

MR. CAMHY: Thank you, your Honor.

(In open court)

THE COURT: All right.

BY MR. CAMHY:

Q Mr. Lill, does it make any difference --

MR. CAMHY: Strike that.

Q Is there any distinction in the treatment of a difference between one which is liquidated and one which is not liquidated? That is, is capital helped in any way by the mere liquidation with a difference? Let's take along difference where you have securities on hand the ownership of which so far as the records,

the audit shows, isn't indicated. Does selling that security help capital in any way?

A Economically there is no help to capital.

Q Now --

A By capital now you are referring to rule 325 capital?

Q Either net worth in the capital sense or rule 325 capital. Just the mere selling of a security.

A No.

THE COURT: Mr. Camhy, I am going to suggest that when you get to a point that you can stop that we'll adjourn. I have a verdict and --

MR. CAMHY: This would be the point, your Honor. I would prefer not to launch into all of this. I do want to get into something else.

THE COURT: All right, then, in those circumstances we'll adjourn until tomorrow morning at 10 o'clock.

MR. CAMHY: Thank you, your Honor. Your Honor, may I have leave tomorrow morning to make a very short for the record renewal of my amendment motion? It will take no more than two minutes.

THE COURT: Well, I think your record is protected, Mr. Camhy. I have denied it. I have set

forth my reasons for it. I don't see any point in your --

MR. CAMHY: May I just say one sentence now?

THE COURT: You may say one sentence now.

MR. CAMHY: Your Honor, I think that it's Mr. Brooks' job here to demonstrate much more specifically than he has how there would be any prejudice to this amendment. I don't think that his statement in the conclusory fashion that they were offered demonstrate that there will be any prejudice.

THE COURT: But the point is that I have denied the motion on several grounds. I have no -- I may agree with you that some of the proof may be the same but I have given my reasons for the denial. I don't care whether they accord with Mr. Brooks' reasons for wanting to be denied that's what you have to deal with, not Mr. Brooks. And I have stated my reasons for denying it and I stand on that. That's all right, Mr. Brooks, it's my reasons for denial.

MR. BROOKS: I would like to call to Mr. Camhy's and the Court's attention that we submitted a 20-page memorandum where I think we were quite --

THE COURT: All right, I think you are

protected, Mr. Camhy and if I am in error you will have me corrected.

All right, we will adjourn until tomorrow morning at 10.

(Adjourned at 4:45 p.m., to June 18, 1975 at 10 a.m.)

cmr 94

HOWARD C. HIRSCH, et al.

vs. 72 Civ. 775

HASKINS & SELLS, INC., et al.

June 18, 1975
10 a.m.

Trial resumed.

- - -

(In open court)

E D W A R D J. L I L L resumed.

DIRECT EXAMINATION CONTINUED

BY MR. CAMHY:

MR. CAMHY: May I, your Honor?

THE COURT: Yes.

MR. CAMHY: The last question yesterday was:

"Q Is there any distinction in the treatment of a difference between one which is liquidated and one which is not liquidated? That is, capital helped in any way by the mere liquidation of a difference?"

It says with a difference, I mean of a difference.

"Let's take a long difference where you have securities on hand the ownership of which so far as the records,or the audit shows, isn't indicated. Does selling that security help capital in any way?

"A Economically there is no help to capital.

"Q Now --

"A By capital now you are referring to rule 325 capital?

"Q Either net worth in the capital sense or rule 325 capital. Just the mere selling of a security.

"A No."

Q Now, if you identify the difference and establish that there is no claim against the security and you sell the capital -- you sell the security and put it into cash and credit net worth I gather capital is helped, is that correct?

A Capital is helped. If by identify you mean if you resolve the long difference and it no longer has the status of the difference, and it's sold you find the solution and you find the solution and you find that the stock does belong to the firm and it's sold then capital is helped, yes, sir.

Q Can you think ofany reason why it was suggested that liquidating the security would help capital?

MR. BROOKS: What is the question, your Honor? Suggested by whom? I don't think there is a foundation for that.

Q Did you get the impression at this meeting that liquidation of these differences would help capital?

A There was going to be, I got the impression at the meeting that there would be different treatment after liquidation than while they were still open, yes.

Q And didn't you testify on examination that you were at least to a degree --

MR. HYDE: May we have the page?

Q On page 118. Starting on page 116.

Your Honor, may I read?

THE COURT: Yes.

MR. CAMHY: Page 116.

"Q Did this question then of improving capital by disposition of long security differences come up?

"A It came up. But in a different format than the way" --

MR. CAMHY: Your Honor, if I may, could I have the witness look at this statement?

THE COURT: Yes.

THE WITNESS: Is this my pretrial deposition?

THE COURT: What are you reading from?

MR. CAMHY: Yes.

THE WITNESS: I do have a copy of that in my briefcase.

MR. CAMHY: I will let you have my copy (handing). Page 116.

MR. HYDE: How far are you asking him to read?

MR. CAMHY: Line 11 through page 117, line 20, and then page 118, line 15 through page 118, line 23.

MR. HYDE: Well, your Honor, is this intended to indicate some difference between the testimony that the witness just gave and his pretrial deposition?

MR. CAMHY: Not yet, your Honor.

MR. HYDE: Then what is the point --

MR. CAMHY: I am just trying to save some time, Mr. Hyde.

MR. HYDE: By reading in --

MR. CAMHY: By asking the witness what he was asked then and putting it in in a --

MR. BROOKS: I object to that, your Honor. I don't think that's the proper way to proceed in a trial.

THE COURT: All right. All right, Mr. Camhy,

the objection is sustained.

MR. CAMHY: All right, may I hear the last question and answer?

(Record read)

MR. CAMHY: Your Honor, if I may, it's my understanding that I would have the right to read these independently and Mr. Hyde would have the right to read any other portions that he wished. It's independent of calling the witness. These are admissions by a principal of a party that were made in proceedings and I could read them.

Now, I agree that ordinarily --

THE COURT: Mr. Lill, is one of the principals of the accounting firm?

MR. CAMHY: Haskins & Sells.

THE COURT: All right.

MR. CAMHY: Thank you.

"Q And didthis question then of improving capital by disposition of long security differences come up?

"A It came up but in a different format than the way you have described it. It came up in a way that if it was decided that short differences should be charged against capital it did not seem realistic to give credit to some part of the long" --

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"Q Not to give.

"A -- not to give credit to some part of the long differences. Keep in mind now that at the time neither the short differences were considered a charge nor were the long differences considered a credit.

"So that it was put in a frame of reference that if the short differences were a charge should some credit be given for the longs. There was a lengthy discussion on whatthe longs involved and the fact that there were long differences in dividends and long differences in fails and things of this nature that would relate to some of the short differences but which had not been applied against each other. It was inthis discussion that it was concluded that the exchange would not -- could not give credit" --

MR. CAMHY: No, that's been corrected.

-- "It was in this discussion that it was concluded that the exchange could not give credit for the long differences. It was not concluded how much of the short differences should be charged but it was concluded that the exchange would not give credit for the long distances but the exchange would give credit oryou would avail yourselves of credit if the long differences were liquidated.

"Now, I don't know that there was a clear understanding by any of the parties present as to at what point doyou liquidate. When you should liquidate. But it was certainly an understanding -- it certainly was an understanding that the only way you could get any credit for the long differences which would offset a part of any charge that was incurred by the short differences would be through the liquidation route."

Now, I am skipping over to page 118, line 15:

"Q Now, can you recall what rationale underlay the difference between liqudating the long difference and helping capital that way and just merely taking a book credit for the long difference?

"A I cannot. As a matter of fact, I don't understand that there is any substantive difference. Whether or not the long difference is liqudated it's still considered a liquidated , a difference and it's still reserved."

Then on page 119 --

MR. HYDE: I am sorry, the word should be researched.

MR. CAMHY: All right, it's still researched.

-- "It's considered a liquidated difference and it's still researched."

exchange's computation and you knew there were going to be some liquidations but you did not know whether capital would be -- the computation would be satisfied by those events.

A When I left this meeting I knew there were going to be additional charges for eight million one. I also knew that there were discussions of areas where there would be reduction of charges as was indicated on the bottom of page 2 of that memo. And the timing about what point would the eight million one be charged and whether or not by the time that was charged there would be other improvements was not concluded. It was an unknown. We left the meeting and there were several things for further consideration.

Q Well, they asserted that the deficiency existed as at the audit date that it should have been in your audit, isn't that right? That was the purpose of the meeting, it related to your audit?

A The purpose of the meeting was to review the audit questionnaire and discuss these items.

Q Yes. Now the capital computation that you made was as at the audit date but reflecting certain further additions made after the audit date.

A At this meeting it was discussed that the exchange

Q What you are saying then is that there is an attempt to retroactively look at it and see what's happened since to determine whether retroactively it has been cured, isn't that right, just as you looked at the additional capital that was put in, the question is have any other events occurred that would cause you to think some help has been given to the ratio?

A Yes. It's a computation that each element changes. The basic requirement for capital could change $10 million in a day simply by a change in aggregate indebtedness.

Q But the only things referred to in this letter are the fact that they think on the audit date you were eight million one out and would charge you accordingly, and, further, they wanted to know what else happened other than the six million that went in.

THE COURT: I think now we have gone beyond the scope of questions and answers, and you are arguing with the witness. I think your positions are clear. Let's proceed.

MR. CAMHY: Your Honor, I would like to read from page 288, line 19, of the witness' deposition.

Q Do you have 288?

A Yes.

Q "Q Did you have any discussions with Mr. Speicher in December 1969, early part of January 1970, with respect to the liquidation of long security differences?

"A Mr. Speicher called me sometime late in December to discuss the liquidation of long securities, particularly with respect to the tax aspects and the trade date versus the settlement date from -- as to which partnership year they would be in.

"Q Did he tell you that they had liquidated approximately $6 million worth of longs?

"A I think at that time I talked to him he probably told me they were going to liquidate. I don't know that he mentioned the amount, the exact quantity, but I certainly knew they were going to liquidate the longs.

"Q Did Mr. Speicher discuss with you that they were going to buy in substantial amount of shorts at that time?

"A He also mentioned that, yes.

"Q Did he mention the figure?

"A No, he may have. If he did, I don't remember.

"Q Does the figure of $4 million refresh your memory on that?

"A He may have mentioned that. I don't

remember him mentioning it. When it comes to the buy in of the shorts the buy in of the shorts in December had less significance to me because they had been buying in shorts all year, whereas the liquidation of longs was only done in December.

"Q Did Mr. Speicher discuss with you the effect that the liquidation of the long securities and the buying of the short securities, and the buying in of short securities on the P&L"-- that means profit and loss, right?

A Yes.

"A On the financial statements?

"Q Yes, in December of 1969.

"A Probably did, yes. Particularly the tax aspects. Which partnership year the items would be charged or credited to.

"Q Did he tell you the results of the purchases and sales which we have just discussed would have the net effect of improving their capital position and net worth by $2 million?

"A I don't believe he mentioned those exact numbers, but he may have. As I say, the -- that would be the effect of just the December items. I think if you took the whole year overall you would probably find

for the liquidation authorization that was in that memorandum.

A I did have reservation about the rationale. As I indicated, I do not see a substantive difference between getting credit for longs through liquidation or getting credit for longs in a formula computation. The credit can be obtained in either way as long as it is a proper interpretation under the rule.

Q Is it your testimony that you did not know that Mr. Speicher intended to and did accomplish these liquidations for the purpose of achieving capital compliance?

A For improving capital or following instructions, or for what reason, it was a clear understanding in my mind that he was proceeding with the liquidations.

Q And the reason he was doing it was to get himself into capital compliance?

A To improve capital. Not to get into compliance, but, as I indicated, I don't know they were out of compliance at any given date.

MR.CAMHY: Your Honor, I guess we have been over this. Just one more question.

Q You knew there were going to be $8 million more in deficiency charges arising from these dividends on

fails, and you knew he had to make it good somehow, didn't you?

A But I didn't know -- yes, I knew he had to make it good somehow, but I did not know that there were not other items that had changed so that the $8 million charge could be borne simply by the other changes.

Q Did anybody ever bring those to your attention? Did you ever hear they reached capital compliance by some other route?

A I hadn't heard they were out of or into compliance during this period of time. This was a period of time during which there was no audit underway.

THE COURT: You said you had not heard?

THE WITNESS: I had not heard.

Q Mr. Lill, we are talking about five or six days, from the 16th to the 26th or maybe to the 29th. We are talking about eight or nine days. On the 16th you were told there was eight million more somebody had had to raise, and then you wrote this memo to Speicher about the suggestion that was made at the meeting. Mr. Speicher told you that he was going to do this. He went and did it.

Now, didn't you therefore know that that was the way he was going to solve his problem?

A He was doing it to improve the capital position. I don't know that they were in violation. Mr. Camhy, the capital requirement is a percentage of aggregate indebtedness which for a firm the size of duPont was in the hundred million dollar area. Aggregate indebtedness can change and your capital requirement can change significantly from week to week, so I can't say that I knew that they were in violation on December 16 or on December 26.

Q Now, Mr. Lill, let's just deal with that for a minute. You attached to your computation two documentary proofs of additional capital which postdated your computation by a month, didn't you?

A Yes.

Q If one were to follow your theory you couldn't have had to bother with that, would you? You could simply tell the world or the exchange so much has happened since that date it doesn't matter. But you went tothe trouble of putting the two things on to show the six million had been made good?

A They were significant subsequent events.

Q I am suggesting to you, all of us being human, and having to deal with the passage of time, we nevertheless try to make some sense out of what we are

doing, and wouldn't one of the purposes of this meeting to tell you that they counted it as being eight million more, and what were you going to do about that eight million, and wasn't one of the purposes of Mr. Speicher being, just as you added those two times items, to add on what he did as a result of the liquidations?

A During this period of time computations were being made weekly, Mr. Camhy, by the firm.

Q Yes.

A I was not a party to the computations and I didn't receive them weekly.

THE COURT: Mr. Camhy, doesn't this dissolve into a difference between you and Mr. Lill? You are insisting that it relates to the lack of compliance as of the date of the audit, and Mr. Lill is testifying contrary to you, so what you are really doing is arguing.

MR. CAMHY: May I be permitted a word of argument at this point, and not a question? I wish to make a point to your Honor, which is that the point I am trying to make with the witness is that they all had to deal with the passage of time, and he did it by adding on numbers, they did it by pointing out that they recomputed the audit. They told him to raise

differences that were created prior to the merger date from those that could be identified subsequent to the merger date, because there was concern -- I believe the agreement provided that the Hirsch parties wouldn't be involved in any losses incurred as a result of differences arriving prior to July 2, and their interest was primarily could Haskins & Sells in connection with their next audit identify which ones were created before and which ones were created after, and I responded I couldn't do that. The only thing I would be able to do the next audit would be to identify the differences at the date of thenext audit, and I wouldn't be able to determine which ones were in existence prior to July 2 and which ones came about after July 2.

THE COURT: We will adjourn until 2 o'clock.

(Luncheon recess)

analysis of those by his principals, the plaintiffs, and I would like to show that there was no person better qualified to make that analysis than Mr. Garibaldi because he did such things as prepare those reports when he was with Haskins & Sells for a firm as large and complicated as Merrill Lynch.

MR. HYDE: I think the evidence will show the plaintiffs delegated the job of going out and doing the investigation of duPont to Mr. Garibaldi.

MR. CAMHY: Your Honor, Mr. Garibaldi's competence I don't think can be established in this way. Unless we were to go into everything he did in the Merrill Lynch audit, and even then it dates back to 1958.

THE COURT: I am more or less inclined to agree with that. Is Mr. Garibaldi going to testify?

MR. CAMHY: I believe so. They subpoenaed him and I plan to use him.

THE COURT: It seems to me there is no point in doing indirectly what you can do indirectly.

Q Mr. Lill, yesterday you used the term paperwork crunch on Wall Street, and I think today you gave us some dates, that it started in 1967 and started ending sometime in mid-1969, early 1969, is that right?

A Yes. It was '67 and '68 were the big years, and then in '69 it started to tail off.

Q Would you tell us exactly what you meant by the paperwork crunch? what are some of the details of that? How did they reflect themselves?

A Well, there were large numbersof security transactions. The volume of transactions was unusually great, and the settlement procedure became very strained. There were large numbers of over-the-counter issues traded, and large numbers of listed issues traded, all of which involved a lot of securities movement, more than the brokerage community was equipped to handle at the time.

The large number of journal entries, the large numbers of movements of securities, gave rise to large numbers of errors and delinquencies in record keeping on Wall Street in general.

Q What efforts did brokerage firms follow or make to cope with this problem?

MR. CAMHY: Your Honor, is this general testimony as to the status of the industry or duPont in particular?

THE COURT: I think what he is attempting to put in the record is that during that period of time,

part of which you are certainly concerned with, that there was a great deal of overwork and that the record keeping was in a chaotic state in most of the brokerage firms. I think he is entitled to put that in the record.

MR. CAMHY: I think the question was directed to the efforts firms made to cope with it. Is he doing to be established as an expert on firms besides this firm, and if so, should that be made clear?

THE COURT: I will allow him to answer the question. Let's see where it goes.

A The firms generally had to employ more people. They employed large numbers of temporary staffs, and they just tried to increase their computer capacities and increase their clerical capacities so that they could cope with the large number of transactions.

Q Is the computer capacity of a firm sometimes referred to as its electronic data processing capacity?

A Yes, sir.

Q Were these efforts undertaken by the firms during the paperwork crunch to cope with it a source of substantial expense to the brokerage firms?

A Yes, they were.

Q What impact did the paperwork crunch have on the firm's ability to compute its net capital under

Rule 325?

A Well,to compute capital under rule 325 you need currant records, so to the extent that this crunch caused erroneous records or a delinquency in records it had a negative effect on their ability to get a good, accurate computation.

Q And is it a general rule that if you have inaccuracy or uncertainty inyour records you can't claim credit for an item which you cannot fully identify?

MR. CAMHY: He is leading the witness in a cross-examination which is really direct examination. There are ways of framing the question without putting words in the witness' mouth. I appreciate I had to call this witness becasue that's the way I have to prove the case, but I don't think it'; a license here for the defendants to turn this into a parroting situation where they propose various formulations and have the witness agree with them. I object to the form of the question.

THE COURT: Thoughyou are examining him as an adverse witness I don't really know how Mr. Brooks could take advantage of that as far as I can see in cross-examining him. There is no way to deal with that. I don't know what you mean by direct examination

on cross-examination. He is cross-examining him.

Proceed.

MR. BROOKS: I may also point out there are cross-claims outstanding between Hasksins & Sells and the stock exchange.

Q Do you have the question in mind, Mr. Lill?

A No, I don't. Will you repeat it, please.

MR. BROOKS: Maybe the reporter can read it back.

(Question read).

A I am not sure I fully understand that question. Credit for long items?

Q Let's take the item we have been spending most of our time on, a long securities difference. If you have something as a long securities diffrence, I assume that in the records there is an inability to fully identify the situation, is that correct?

A That's right. Otherwise it wouldn't be a difference.

Q As long as it remains a difference, it at this time is not eligible for any capital credit, is that right?

A Yes.

Q Suppose you did research on a long securities

difference and discovered that that was really owned by the member firm. Then you could claim capital credit for it, could you not?

A Once you found -- yes, once you completed a reasonable amount of research and enough time elapsed with no claims coming in then you would claim a credit.

Q Is the same analysis applicable in the area of fails?

A Fails generally have money against them, so, you know, there is a ledger balance against a security delivery. If there was a fail without money against it then it would be treated the same as the difference.

Q Prior to the time of the paperwork crunch, had security differences been a problem in the brokerage accounting function?

A Not to my knowledge. We did not have problems.

Q How about fails?

A Fails were not either prior to that period.

Q So that these are relatively new concepts, is that correct, at this time?

A New problems, yes.

Q Was there a good deal of disputation amongst accountants and member firms and regulatory

duPont itself?

A Some part of the differences arise from other brokers or transfer agents or banks.

Q Wasn't one of the big problems during the paper work crunch the fact that the transfer agents were just swamped and were six to eight months behind in getting out their transfer material?

A The transferring function was one of the larger causes of the problem, particularly in duPont.

Q Do you have any figures as to how far the transfer agents fell behind at the height of the paper work crunch?

A Not that I recall. They were delinquent, I couldn't quantify the delinquency.

Q When a firm has, say on its books, a fail to receive, is it likely that that fail to receive reflects the fault of somebody other than the brokerage firm which fails to receive?

A Fail to receive by its nature is not necessarily a fault. A fail to receive is a very legitimate item in recordkeeping. The fact that a fail to receive gets old is because of another broker's inability to deliver it to you.

Q Can short securities differences or long

A I will agree.

Q Do you recall that Exhibit 123 was prepared at the exchange?

A It was.

Q Did you review it before it was sent out?

A I did.

Q And to the best of your knowledge was it accurate at the time you prepared it?

A It was.

MR. CAMHY: May we have that marked in evidence please?

MR. HYDE: Received in evidence?

MR. CAMHY: Yes, received. I offer it.

MR. HYDE: Is this offered with respect to Haskins & Sells?

MR. CAMHY: Yes, it is.

MR. HYDE: I object, your Honor. I object with respect to Haskins & Sells on the grounds that no foundation is shown with respect to that defendant.

MR. CAMHY: Your Honor, I am not suggesting that Haskins knew the memorandum or saw it or knew even of its content. What I am asking to do is prove the content through this witness as refreshing his recollection of the facts and then proving the facts--

above mentioned charges against net capital asserted by your department Messrs. Speicher and Gay of FID met with you to discuss the remedial steps" etc. "They reported to a meeting of the finance committee . . . that with your approval and even at your suggestion a program of liquidation should be undertaken to reduce the firm's overages. The completion of this program together with the additional capital raised by duPont resulted in the compliance of the firm with Rule 325 on December 24, 1969 as indicated in the staff memorandum."

Now you received and reviewed this letter, didn't you, Mr. Chenet?

A Yes. After Mr. Bishop had received it. It was passed on to me.

Q Had Mr. Bishop seen the memorandum of February 2nd, 1970?

A Yes.

MR. CAMHY: Now we go to Exhibits 124,125,126, 127, 128, 130, 132, 133. Your Honor, these exhibits I will ask the witness to identify, in each case they have to do with what the exchange knew abour duPont resulting from the events of the previous approximately one year prior to the merger. Some of them are referred to in Mr. Chenet's memorandum of February 2, 1970.

to and what he is talking about.

MR. CAMHY: Well, your Honor, on deposition I showed him the memorandum and asked him, "I ask you whether you agreed or disagreed with the view set forth in the first pagraph," and I got an answer.

May I read that answer?

THE COURT: Why don't you ask him, put a question to him that covers the items in the first paragraph and ask him does that accord with his views at the time and during his investigation. I assume he was a part of the investigating team.

Q Mr. Chenet, based on your evaluation of the duPont situation at that time would you agree or not agree with the recommendation that the merger be delayed until, one, assurances of additional capital are provided and, two, that duPont's operations exposure be completely identified and substantially reduced?

A Speaking as duPont's coordinator I would agree with number two.

Q That is that the merger be delayed until duPont's operations exposure be completely identified and substantially reduced?

A I would probably quarrel with the words "completely identified". I don't know -- but certainly

A No. Wrong figure. Six million odd.

Q No, I am not talking about what was liquidated. I am talking about the charge they intended to make.

A Yes.

Q Eight million one.

A Correct.

Q That figure came from the Haskins & Sells audit, did it not?

A Yes.

Q There was another figure in the Haskins & Sells audit which was called dividend differences of approximately one million eight?

A Yes.

Q Do you recall that there was discussion of that particular charge, also?

A Yes.

Q As I recall, that charge was resolved by a reclassification of the item?

A After Haskins & Sells wrote a particular adjustment to it, or a statement to it. I have forgotten the exact facts.

Q Which in effect adjusted their classification of the item as at the audit date?

A It changed its status, yes.

THE COURT: Mr. Camhy, I am not clear on this. I thought the eight million you referred to it as coming from the Haskins & Sells audit showing what, a difference? What I don't understand is you referred to it as a charge. I thought the charge was a penalty that the stock exchange was going to impose.

MR. CAMHY: The eight million one, as I understand it, and as I understand the witness has testified to it, was something called dividends on securities failed to receive. And it was an item which the exchange was going to burden capital with so as to reduce capital by that amount.

Q Is that correct, Mr. Speicher?

A Yes.

Q Following that discussion, did the duPont firm proceed to liquidate approximately six million dollars in long difference securities?

A Yes.

Q That liquidation resulted, I presume, in certa cash proceeds?

A Yes.

Q Was the cash proceeds used to buy in the items which formed part of these capital charges?

A Yes.

Q Approximately how much of the proceeds was used for that purpose?

A In the area of four million plus.

Q The balance of the six million proceeds, was that simply infused into the general cash funds of the company?

A Yes.

Q Did that have its concomitant effect on the company's P and L?

A Did it what?

Q Did it have its consequent effect on P and L?

A Yes.

Q To that extent thereby improving the profit or perhaps reducing the loss by approximately two million dollars?

A Yes.

Q And thereby increasing net worth by that amount?

A Yes.

Q What was the effect on capital computation of the six million dollars proceeds? Was that approximately an eight million dollar effect?

A No.

Q What was the effect?

A Six million.

Q Six million?

A Yes.

Q And that reduced your capital deficiency by approximately six million dollars?

A Correct.

Q Were these securities securities in which you had identified a particular -- the long securities sold, were these securities in which you had identified a particular proprietary account of the firm which indicated that the firm owned them in a particular account?

A No, it was not located in a firm proprietary account.

Q As I understand it, these were securities where you did what you considered to be adequate research against your records and found no other claim against them?

A At that time, that's right.

Q Yes. So your position is that you found that you actually had the securities. You checked to make sure it wasn't just a ticket, but really an actual security in the firm's position, is that correct?

A That is my understanding of what was done in the cage, yes, sir.

Q Secondly, it is your understanding that the firm had what they considered an adequate look for the security, for an account in which the security belonged, and found

that they had no such account?

A I don't follow the question.

Q It is your understanding that there was a search for a place belonging to a customer, another broker, some other claim on the stock, against the firm's records, and that they could find no other claim?

A None at that time.

Q This in effect meant that you were, based on your records, over the stock?

A Correct. Before the sale.

Q Excuse me?

A Before the sale.

Q Before the sale.

A Yes.

Q Did you advise the exchange of what you did? Did the exchange know you were doing this?

A I know they did somewheres between the 16th and the 26th or the 27th.

Q And did Haskins & Sells know you were doing this?

A Yes.

Q And was this done consistent with the instructions or the conversation you had with Mr. Bishop, Mr. Lill, et cetera?

A I believe so.

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question to Mr. Chenet not in reference to the memorandum, because he had never seen it, but it was simply a question.

THE COURT: I don't have the transcript in front of me, but my recollection is that he was asked-- Mr. Dominach had stated two positions, A and B, and he said he agreed with B and not with A: I gather that is the position Mr. Camhy has taken.

MR. BROOKS: I just wanted it to be clear Mr. Chenet testified yesterday he had not see the memorandum but had had oral discussions.

THE COURT: I understand that. But the positions that were taken in the memorandum, as I recall, were read to him and he indicated that he accepted the second but not the first proposition.

MR. BROOKS: That is the way the transcript reads, and I think that is correct.

Q Mr. Chenet, would you look at page 120 of your deposition.

A Yes.

Q I said"And to your knowledge" -- well, I asked you whether you agreed or disagreed with the view set forth in the first paragraph:

"Q I ask you that now.

"A I would have been in general agreement with that

recommendation, yes."

MR. BROOKS: Is this something being submitted as contradictory to what the witness said at the trial. I think it supports it.

THE COURT: That is my view.

MR. BROOKS: I move to strike reading from the deposition.

MR. CAMHY: It is different. I interpret it one way, perhaps Mr. Brooks interprets it another way. I submit it is different.

THE COURT: It is not. I don't think that is the kind of testimony that can properly be used to impeach the witness. At best it is ambiguous.

MR. CAMHY: He is an agent of the defendant, your Honor. His prior testimony would always be admissible. I agree it is not a contradiction. I simply want to show on examination he didn't seem to make this distinction.

MR. BROOKS: I disagree that his prior testimony is an admission against the exchange. For it to be admissible he would have to be an agent or officer, neither of which he is.

MR. CAMHY: You mean the testimony of an employee of the exchange is not binding?

MR. BROOKS: Not to my understanding.

THE COURT: Nor to mine. My understanding accords with Mr. Brooks.

Q You communicated your views to Mr. Stock?

A Yes.

Q And Mr. Stock was your superior?

A He was.

Q Did you communicate those views to anybody else?

A No, sir.

Q Were you present at the meeting with Haskins & Sells on December 16, 1969?

A I was.

MR. HYDE: You mean the meeting at the stock exchange?

A Yes, the meeting at the stock exchange with Haskins & Sells and duPont?

A I was.

Q Was the purpose of that meeting to review the capital computation as shown in the audited financial statement?

A That was one of the purposes.

Q Were the parties informed that there would be additional charges in that computation?

A Yes.

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Q Would you look at Exhibits 143 and 154.

MR. CAMHY: Your Honor, may I show them to the witness to save time?

THE COURT: Yes.

MR. CAMHY: Your Honor, this will be quick, and it may not necessitate your hunting up the document.

THE COURT: All right.

Q These are the examiner's computation based on the exchange's examination of the Haskins & Sells audit, are they not?

A These are summaries.

Q Yes, summaries of those computations?

A Yes.

Q My question is, did the examiners make this information known to you in or about December 1969 and at or about the time of that conference?

A Yes.

Q In substance, isn't this what you communicated to the parties at tne conference, these adjustments?

A Yes.

Q Can you identify on these certain handwriting where it says on Exhibit 154 the words "No

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discussions on that point prior to the receipt of these answers.

Q Did you say it was an unusual item?

A As I recall it was unusual.

Q Had it been seen before in respect to any other firm as far as you know?

A It probably had. I don't think it was common.

Q How about the eight million dollar item that Mr. Camhy referred to? Had that type of item been subject to different interpretations within the exchange's staff?

A Not different interpretation that I recall. It had been the subject of discussion.

Q Let me show you Exhibit 26, Mr. Chenet, which is the long form questionnaire as of September 28, 1969.

I call your attention to item 13, which Mr. Camhy has just referred to, to the entry "Valuation of security count differences and dividend differences."

Do you see that, sir?

A Yes.

Q As I understand your testimony, at this December 16th meeting it was agreed that the one million eight in short items reflected in the answer to that question would be reclassified. Is that your recollection?

A It is.

mdh6 Chenet-cross

Q What was the basis for that determination that it would be reclassified?

A It was based on Mr. Lill's representation that there was no real difference between the two differences.

Q What did the exchange understand was the nature of that item before the meeting?

A The nature of the item was not clear to the exchange.

Q Did the exchange interpret it as a dividend item before it determined that it should be charged?

A I believe that it did.

Q On the answer it appears, following a heading "valuation of." And then two entries, securities differences and dividend differences, does it not?

A Yes.

Q Was the information that Mr. Lill supplied at that meeting that this indeed was a difference, albeit a dividend difference, and not a dividend, and, therefore, was no different than any other differences?

A Yes.

Q And what was the exchange's treatment of differences at this time in respect to it being acharge or not a charge for Rule 325 purposes?

A Short differences?

Q When you came to duPont, did you find that there were substantial back office operational problems?

A After I arrived?

Q Yes.

A Yes.

Q And was part of your job dealing with those problems?

A In the overall concept of my job, yes.

Q In or about the middle of December 1969, did you attend a meeting at the Exchange at which Mr. Lill was present, Mr. Speicher was present, and Mr.Bishop and others from the Exchange were present?

A I attended a meeting at the Exchange the middle of December. I don't recollect if Mr. Lill was there, but the other people were.

Q Do you recall the discussion of the additional charges to capital?

A Yes, I do.

Q And do you recall that there was a suggestion that capital could be helped by the liquidation of securities in the long-difference accounts?

A Yes, I do.

Q Can you tell us what it was that you heard as far as the suggestion is concerned?

A There was a conversation about capital itself in its broad context.

During the conversation, Mr. Bishop brought up the fact that if we had long stock record differences, or security count differences, excuse me, and they are legitimate or bona fide long differences, then we should consider selling some of these differences out.

mdh 1 Gay-direct

T2A

Q Can you tell me what you understood him to mean by legitimate long differences?

A I considered that Mr. Bishop indicated or meant by his indication that the firm would do research and would do that which is necessary to establish whether a long count difference is truly a long difference and therefore can be sold out.

Q Again, would you tell me what you mean by a long difference in this context?

A In its simple situation, it would be that you would have one customer that owned 100 shares of American Tel, and you had 200 shares in your possession.

Q So then you would have 100 shares extra, and no customer with a claim against it?

A No customer on our books.

Q On your books?

A That's right.

Q So that what was involved would be the search of the records for a claim against the shares that you seemed to be over?

A It would be a lot more involved than that.

Q Would you describe what was involved?

A Let me say that my illustration would be a very simple -- was a very simple illustration of 100, 200.

mdh2 Gay-direct

As a matter of fact, in a firm such as duPont there would have been many positions on the record for American Tel. There may have been 500 different positions for customers, bank loans, for transfers, for stock loans, for sales, stock borrowed, items in transit, and many type of situations and transactions that would have appeared on the books.

In researchingyou would have had to try to identify the count or the control count that was performed by Haskins & Sells accounted for all of these items. In addition to that you would have the additional problem that customers were writing letters into the firm regarding their confirmation of their customer statement. You would have to go into those letters to try to ascertain whether someone said "You owe me 100 shares of American Tel & Tel, it doesn't show on my statement."

We did have an extremely bad situation at that time, "We" being the industry as opposed to only duPont, that not only weren't the customers sending back their confirmations in great numbers but the confirmations to the banks and the confirmations to the brokers in the industry were very poor in their response. Therefore, you did not have a real full picture in a lot of the areas.

Q When you speak of confirmations, you mean those communications sent out by the auditors to the people with

whom the firm dealt seeking to confirm a status of an account on a particular date, is that correct?

A Yes.

Q So what I understand you to say is in addition to going through your own records you would go through customer communications such as complaints, and then you would go through the customer confirmations which the auditors sent out as to which you had gotten responses?

A Yes.

Q This fundamentally, though, was a search through your records and through the auditor's procedures of confirmation and through communications from stockholders and through other records available to you for a claim against a stock which you had in your possession, is that correct?

A To try to identify that someone was making a claim for a security that we didn't show him on the record as being owed the security to.

Q You then concluded that if it is a legitimate long difference, if after doing that kind of a search, you cannot come up with a claim which takes the stock, is that correct?

A If you performed all of those steps and identified every one of those items, yes, that is absolutely true.

mdh4 Gay-direct

Q And so then your position is that if I look through all of these things and I can't find somebody else claiming it, then it is a legitimate long difference?

A I would say that's so.

Q And that was the kind of a difference which you thought you could liquidate?

A That's what I felt that Mr. Bishop meant when he talked about liquidating long differences. We should say long security count differences.

Q At the time of this meeting, December 16th, had there been attempts to resolve these differences on a specific identification basis-- that is to say, to find that specific event or date or transaction which caused the error that gave you the stock?

A I don't know whether you are asking me whether what I explained would be the process or a new process.

Q No, whether some other process was in force or some other process was in operation seeking to find the specific event or transaction to which the stock apparently related.

A If we had found the specific event we wouldn't have had the difference.

Q A time came after December 16th when you prepared certain lists of securities which might be eligible for treatment in accordance with your understanding of the

mdh10 Gay-direct

A ell, we took up that matter because of the conversation at the exchange.

Q Yes.

Now, when these securities were sold, did you maintain a liquidation of differences account -- that is, did you preserve these differences in any particular place so that you knew what you had liquidated and you could always go and say "This is our liquidation of differences account in the firm"?

A No.

Q Did you maintain any reserve against the possibility that there would be claims on these securities?

A Not to my knowledge.

Q Mr. Gay, I am showing you two exhibits which are standard special operations questionnaires which duPoint filled out during this period. Your name appears to be on one of them as member in charge of operations. Yes, it is on both. That's right.

Q Mr. Gay, looking at that questionnaire, is there any place where you could tell that long differences had been taken and had been liquidated and had been used to buy up capital charges and infused into net worth?

A I don't understand the question, Mr. Camhy.

Q There is a showing of long differences, isn't

mdh11 Gay-direct

that right?

A Yes, there is.

Q And there is a showing of short differences?

A Yes, there is.

Q But is there any showing of long differences that have been liquidated?

A No.

Q And is there any showing that the liquidation went into the general revenues of the company?

A Not on these questionnaires.

Q Are you familiar with the long form questionnaires?

A Yes, I am.

Q Would any such showing be made in the long form questionnaire?

A The long form questionnaire would have been filed prior to --

Q I am talking about the January 30th long form questionnaire. There was one that was unaudited.

A I don't believe there was a long form questionnaire in January.

Q I guess we are just in error. I don't know whether it would help if I showed it to you.

A The long form is the auditor's questionnaire. I didn't know there was one in January.

mdh12 Gay-direct

Q There was a similar type one but unaudited?

A Short form questionnaire.

Q But it looked like the long form in January. Maybe I ought to get it. It is Exhibit 27. (handing to witness)

Would you look at question 13, please. Do you see where it says valuation of securities count differences?

A Yes.

Q Valuation of securities count differences, long, 11,621,000, and short$9,902,748?

A Yes.

Q Now, Mr. Gay, do you recall that on the audited questionnaire as at the previous September the differences long was substantially larger, approximately 29,000,000, isn't that right?

A I recall that.

Q Is there any way you can tell on this questionnaire that six million at least of those differences were sold and went into the general funds of the company to be used to buy up charges against capital and to be added to net worth?

A No, you cannot.

Q Thank you. Mr. Gay, when was the first time you gave notice that you were leaving duPont?

MR. CAMHY: Mr. Lee D. Arning.

L E E D. A R N I N G , called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CAMHY:

Q Mr. Arning, what is your present position?

A Managing partner of Tucker, Anthony and R. L. Day.

Q Were you employed by the New York Stock Exchange in 1969 and 1970?

A I was.

Q In what capacity?

A I was senior vice president for operations of the New York Stock Exchange.

Q Was Mr. Cunningham and Mr. Bishop below you in the chain of command?

A Mr. Bishop was below me. Mr. Cunningham was my superior.

Q What did your job involve during the years 1969 and 1970?

A Are we going to be here that long?

Q Well --

A Let me try to do it quickly for you. I was

responsible for the operations areas of the New York Stock Exchange which encompassed the entire operating departments, department of stock lists, secretary's office, floor department, department of floor procedure, department of member firms, department of stock lists, and the clearing corporation. It involved 3200-odd people.

Q Let's get to the department of member firms. That was one of the departments under your control, wasn't it?

A It was, yes, sir.

Q And that involved to a degree the operational problems and the financial health of the member firms, is that right?

A Yes. Among others.

Q During that year, 1969 and '70, were there a numberof member firms who were in either capital difficulties or operational difficulties arising from the paper crunch of '68 and '69?

A I am not sure what a number means?

Q I mean five or ten.

A Yes.

Q During that period didn't you have problems -- and I am talking about the latter part of 1969 and 1970--

weren't you personally involved in trying to help those firms solve their problems?

A I think that characterization would go for the exchange at large.

Q Yes. But you were involved in it personally as to, say, Blair and Bache and Hayden Stone?

A Well, I wouldn't say those any more than any others.

Q Yes, but --

A Or any less.

Q But some of those were having problems at that time and among them was duPont, wasn't it?

A Yes.

Q Didn't you tell me that this was a difficult period in connection with certain of these firms and that's what got your hair so gray? Do you remember that?

MR. BROOKS: I object to questions referring to firms other than duPont. The complaint doesn't relate to anything other than duPont unless they want to talk about Glore Forgan.

MR. CAMHY: I propose to show during this period, 1969, '70, '71, he was taking several firms through difficult problems and trying to find solutions to those problems for them. They were capital problems,

some of them solved by merger, some of them by liquidation. Mr. Arning has testified to all of this at length.

THE COURT: What's the relevance with regard to this case.

MR. CAMHY: It gets to the degree to which Mr. Arning involved himself in the merger between duPont and Hirsch and Glore Forgan.

THE COURT: Why don't we find out how he involved himself in this merger. If you are going to suggest to me I am going to find that out in what he did in other connections I don't believe I will.

MR. CAMHY: I want to show it was part of his general job at the exchange at the time.

MR. BROOKS: It is irrelevant.

THE COURT: I don't see how it is going to help us. As a matter of fact, it would appear to me that if that is so it ought to be something that Mr. Brooks would concede without any testimony about it.

MR. CAMHY: Very well, your Honor, I will proceed.

Q Mr.Arning, were you involved in a professional way with the capital problems of duPont during the spring of 1970?

A Mr. Camhy, as the senior officer of the

exchange in that area, the matters that arose in the department of member firms of significance were related to me, and in that connection I would have been aware of financial difficulties, operating problems, or whatever existed at any member organization.

THE COURT: Wasn't that part of your responsibility?

THE WITNESS: It was, sir, yes.

Q Did you think that the duPont-Hirsch merger was a good merger for Hirsch, duPont and Glore Forgan? Did you think it had a good fit?

MR. POLLACK: Objection, your Honor.

THE COURT: I have learned that that is a relevant inquiry, Mr. Pollack, so the objection is overruled.

A You confuse me, counselor. When you said Hirsch, duPont and Glore Forgan, I was a neutral observer.

Q I mean for all three firms.

A Can I restate the question?

Q Yes.

A Did I think that this combination offered a potential on a combined basis for a successful operation? I would answer that affirmatively.

THE COURT: You would answer how?

THE WITNESS: Affirmatively.

Q Didn't from time to time during this period Mr. duPont tell you that given the right circumstances he could raise more capital?

A Well, I think in fairness to Mr. duPont that has to be put in a little more different context. The exchange was seeking additional capital. Mr. duPont was the medium by which that was to be accomplished if it was to be at all.

In his appearances at the exchange one of the conditions that Mr. duPont indicated, and he was optimistic about obtaining capital, was that given the proper circumstances, not limitless, but ample capital was available so in that context what you said was probably so.

Q And the proper circumstances would be an entity which had good profitability potential that would attract capital, is that right?

A That is true. That would be one.

Q All right.

Now, didn't the Hirsch, duPont, Glore Forgan merger contain as far as Mr. duPont and as far as you were concerned many of the attributes of that kind of

a combination?

A I think the answer to that is yes.

Q Didn't you regard it as such at the time?

A I did.

Q I show you a memorandum from Mr. Dominach, it's Exhibit 167 (handing). You received that memorandum, didn't you?

A It's directed to Mr. Cunningham and myself and I am certain that I did, yes.

Q And did you -- you did not accept this request, did you, or this suggestion in the first paragraph of that memorandum?

A Well, when you say accept --

Q You did not accede to it.

A Well, it was a subordinate reporting to me and he gave me information thatI took into consideration.

Q And discounted and ultimately permitted the transaction to proceed, is that right?

A I wouldn't go along with any of those questions.

Q All right, let me put it to you this way: Did you act to follow his request?

A Well, counsel, that's like one of your assistants giving you some legal advice and you choose as superior to proceed differently.

Q All right.

A That's the nearest likely approach to this that I can imagine. These were facts given to me --

THE COURT: Wait a minute, Mr. Arning. The question I think is fairly simple, and I think you can answer fairly directly. Did you or did you not follow the advice that is set forth in the first paragraph of that memorandum? The answer can be yes or no.

THE WITNESS: Well, your Honor, I don't consider this advice.

THE COURT: Well, the suggestion --

THE WITNESS: Did I act differently than that first paragraph or if I indeed one can deem what I did to be an act because I am not sure you can. It's not consistent with the recommendations that were set forth here.

Q Well, did you take any action to stop the merger?

A I don't know what action I could have taken, counselor.

Q Well, you could have advised the parties that the exchange did not think the merger would be good for either firm because, or any of the firms because of the operational exposures of F. I. duPont.

A And because this memorandum was sent to me?

Q Yes.

A That's absurd.

Q Well, when you read the memorandum did you feel that any of the statements that were in it were factually not correct?

A Mr. Camhy, as a man who had many people reporting to him and who requested the information set forth in the memorandum that is now in front of this witness, I suggested, absorbed and utilized the facts that were contained in this.

And let's assume for the record purposes that some if not all of these were in some form known to me as well as a good deal of information that was not in this memorandum.

And if you are attempting for me to construct whatever happened to duPont, Glore Forgan on the basis of this single memorandum you are grossly in error.

Q Mr. Arning, let us go with the assumption that there were other factors which made you feel that notwithstanding what was in this memorandum you thought that you should not stop the transaction or try to stop the transaction if you could.

A All right.

Q Now, what I would like to ask you is: Can you tell me what those factors would have been that would have been overriding of the consideration set forth in this memorandum?

A Well, I think the first paragraph of this, which I just scanned a moment ago, established the point of departure here. What Mr. Dominach did was analyze special operations questionnaires which had been in our possession, which had been analyzed by our examining department and which all the officers of the exchange had seen.

His two -- after this he says there are two things that you ought to do and you ought to delay it until you do it, and one is assurance of additional capital. I think I did that.

The second was that duPont's operations exposure be identied and substantially reduced.

Q Well, now, let's get to the first one.

A All right.

Q As I understood it you felt that the way that the capital would come in is if the merger came through, that is that what Edmond told you, or what the duPonts told you was that if they could get the merger

through they would have the kind of an entity which would attract capital.

A I don't think I ever said that.

Q Well, didn't Edmond assure you that --

A One of the conversations that Mr. duPont idenfied as being significantly helpful to the raising of sizable quantities of capital with an oportune situation. This clearly fit that letter definition.

Q All right. So then this --

A But it was not what you said.

Q Well, I am sorry, I will accept what you said. And in fact, I want to show you a document, and it's Exhibit 168. I don't know whether it't in yet.

MR. CAMHY: I offer Exhibit 168.

MR. HYDE: Against the New York Stock Exchange?

MR. CAMHY: Against the stock exchange, yes.

MR. BROOKS: Has the witness identified it?

MR. CAMHY: Well, I am going to show it to him. He identified it on deposition (handing).

Q Mr. Arning, is this a letter that you wrote

to Mr. Latour?

A Yes, I believe it is.

MR. CAMHY: Your Honor, I offer it.

MR. BROOKS: No objection.

THE COURT: All right.

(Plaintiffs' Exhibit 168 was received in evidence)

Q Now, shortly after receiving the Dominach memorandum and just the day prior to the merger, [illegible] you wrote this letter, didn't you? July 1? The merger was July 2, Dominach's memo is --

A June 24.

Q Okay.

Now, looking at the second part of the second paragraph:

"The exchange has been on notice from Mr. Edmond duPont that substantial sums of additional capital were available when the right quote situation was at hand. You and I agree that the present combination of Francis I. duPont & Company with Glore Forgan and Hirsch & Company is just that situation. While I know that you are providing us with daily pro forma capital computation and this figure at the moment is most encouraging, that additional capital is mandatory."

Now, this does tend to confirm what you just said, Mr. Arning, doesn't it?

A I am glad you feel that way. Yes.

Q And that is that in your discussions with Edmond about where the firm was going and in the exchange's discussions with him about where the firm was going that previous spring he said that he could get capital for the right situation and you felt thatthis was the right situation.

A So I did.

Q So that that tended to meet what you felt was -- or that tended to meet what you felt was -- or that tended to override the considerations, the other considerations mentioned by Mr. Dominach in his memorandum.

A I don't buy that.

Q Well, is --

A I don't buy what you just said.

Q Well, that was one of the factors which made you override that memorandum.

A It was one bit of information available to me that was not available to Mr. Dominach.

Q All right.

Now, can you tell me whether during that spring you had a familiarity with the elements which made up

the good fit between Hirsch and Glore Forgan and duPont? That is, did you know these elements?

A Well, I am wondering what you specifically mean by --

Q Well, was it a good fit? Was it a sympathetic merger of things which work together well?

A Let me try to answer that. And in order to do that you have to put this whole thing in perspective of what was going on around you, and when I say that I think the general market conditions are a material consideration, and at the time we had had a severe decline in the market. We had had a drying up trading volume, and an overall market condition not condusive to expansion activities of member organizations.

At the same time the firms at large had spent large sums of money to automate, to develop processes to improve paper handling and in so doing had enlarged their staffs to do this kind of thing.

I think some of the testimony Sam Gay gave a short time ago relates to just the kind of expenditures that had to take place all over the street.

Now, with that as a backdrop with the declining market existing we had a clear cut possibility of operating losses, if they hadn't developed increasing,

and if they had developed expanding even further.

Against that we took a situation here that in my opinion, and mine alone to be sure, offered the opportunity of three member organizations of vast combined savings, a mix of business combining that looked from the point of view that I sat at as contributing significantly to the overall role of a single firm.

You had, inthe case of duPont Glore Forgan -- in the case of Glore Forgan one of the primary investment banking organizations. Neither Hirsch nor duPont had any such factor present in its case.

In duPont's case you had one of the leading distributive organizations in the industry. I don't know how many offices it had. I'd suggest they ranged upwards of 70 to 100. It was a master type of structure to provide distribution for the banking side that was contributed from Glore Forgan.

And then from the Hirsch point of view you had marketing areas almost specifically identifiably difference from those that existed in the old duPont organization. And I am thinking specifically of the lower south and I ma thinking of Florida. I am thinking of Florida and I am thinking of Europe.

And you had the fact that at the Hirsch

organization a number of the management individuals were now somewhat older, not as well as they had been and I felt that in addition to those ingredients we were going to be able to look to a strengthened management team operating a stripped down operation that was going to provide a greater level of profitability and provide a means for the combination and real savings in the operations area. To weed out the softer spots and to have all the attributes of a potentially not just viable but very strong member organizati .

Q All right.

Now, earlier that spring another merger for duPont had been suggested to the exchange, hadn't it? and that was a merger with Blair?

A Well, I think I testified in the deposition I didn't even recall it.

Q Well, do you remember that a merger with Blair was considered and rejected that spring as not making any sense?

A I may be mistaken but my recollection was dim and I had no significance of it at all.

Q Would you have gone along with a merger with Blair at that time?

MR. BROOKS: I object, your Honor. It's

purely hypothetical. The witness doesn't recall such a fact. Besides, what's the difference?

THE COURT: I think that's right. Objection sustained.

Q Well, if the Glore transaction -- if the Glore element hadn't been in this would you have gone along with this merger as much as you did?

MR. BROOKS: Same objection, your Honor. Hypothetical. Irrelevant.

THE COURT: Objection sustained.

Q Were you familiar with the capital problems of duPont during the latter part of December and early part of January?

A What year?

Q 1969, 1970, it's deficiency, $17 million.

A Help my recollection. Is this shortly after the audit results for '69?

Q Yes.

A Yes.

Q So then you did concern yourself with duPont's capital problems?

A I never testified otherwise, that I am aware of.

Q And did you try to keep up with this on a day-to-day basis, or on a week-to-week basis, at least?

A Well, I could clarify that for you easily. The responsibility for the observance of the financial condition, the operations, etc., of member organizations lies in the department of member firms. We have an extremely capable leader of that department, and a staff, an outstanding staff of examiners.

They were the front-line people who were dealing with this, and I was in constant contact with them, and I got information. I was in a different physical location than they were, but I certainly was acquainted with what was going on.

Q Well,wasn't duPont one of several firms which were in what the Exchange considered serious capital condition problems during that period?

MR. BROOKS: What period?

MR. CAMHY: Late '69, early '70, through June of '70.

A Well, I --

Q Wasn't there a list of firms that you were watching because of this problem?

A There were firms that the Exchange watched for capital and operational problems, yes.

Q Wasn't duPont one of them?

A I have said in that period, yes.

Q Wasn't one of your concerns during that period the solution of duPont's capital problems?

A One of my concerns?

Q Well, one of the Exchange's concerns.

A Well, can I substitute"resolution" for "solution"?

Q Resolution, yes.

A Yes.

Q And in that were demands or requests to Edmond duPont and to others as to raising more capital, wasn't that one of the things that was going on?

A There were those requests made, yes.

Q And wasn't this merger part of a program for the resolution of that problem?

A The merger itself?

Q Yes.

A The merger didn't come from the New York Stock

Exchange.

, but wasn't the merger considered by the Exchange as an event which would help resolve those problems? Just going back to that letter about the attraction of capital when the right thing came --

A Yes, but, you see, these things aren't that simple, counselor.

This event, the combination of these enterprises was brought to the Stock Exchange by the people involved. It didn't emanate from the Stock Exchange, to my knowledge.

Q But the --

A When it became clear, and I think you know already that there had been a number of chats back and forth on these kinds of things, about which the Exchange was not involved, but when it became clear that this was going to be the real thing, we took steps to see to it that we would have information about it, that we would know what was going on, that the procedures that would be followed would be established ahead of time, that we'd know what the pro forma capital requirements were, blah, blah, blah.

We, yes, went into depth to find out what was going to happen, but it was something literally presented to us.

Q But it was something that you could have stopped

if you wanted to.

A I don't know how.

Q Simply by telling the firms that you wouldn't let them do it because of duPont's operational problem --

A After what I just described as their potential? I would be having another lawsuit defending that.

I don't think I could have done such a thing.

Assume, if you will, that the combined enterprise met the Exchange's requirements for member organizations from A to Z, which, so far as I know, they did.

Q Well, assuming Mr. Dominach said --

A I can't assume Mr. Dominach said it at all. He was a consultant at the Exchange; he was not employed by it directly. He was familiar with many of its rules.

That was not the spot I was in, Counsel.

Q Did you know Mr. Chenet made the same recommendation?

A I have no idea what Mr. Chenet may have made.

MR. CAMHY: Your Honor, may I read from the deposition, please?

MR. BROOKS: I object to reading from the deposition while we have a live witness on the stand.

It's not an admission of the Exchange.

MR. CAMHY: I think it is.

MR. BROOKS: I disagree --

MR. CAMHY: I am offering this as some inconsistent --

MR. BROOKS: You are offering it as inconsistent testimony? May I ask with what testimony of this witness?

MR. CAMHY: The testimony he has given.

MR. BROOKS: What testimony?

THE COURT: Well, come on, Mr. Brooks, he doesn't have to answer that. What he has to do is read the question and if it's not inconsistent you make your objection then.

MR. BROOKS: I would like the Court to know that at the time of the deposition Mr. Arning was not an officer of the Exchange, so it cannot be an admission of the party.

THE COURT: He is not reading it for that purpose, as I understand it; he is reading it as an inconsistent prior statement.

MR. BROOKS: I will listen with that in mind.

MR. CAMHY: It's a deposition called Deposition Exhibit 102.

Gentlemen, I plan to use Exhibit 102, which is not a premarked exhibit, but it was 102 on the examination of Chenet, but it was used on the Arning examination before

trial.

I will have copies made, but I think you all have access to it.

MR. BROOKS: We have our copy, Mr. Camhy. That won't be necessary for us.

MR. CAMHY: Thank you.

Q Look at Exhibit 102, please (handing).

MR. CAMHY: Now I would like to read at Page 163.

"Would you look at Exhibit 102, please, Mr. Arning, which is a memorandum dated May 13, 1970" --

"Q Would you look at Exhibit 102, please, Mr. Arning, which is a memorandum dated May 13, 1970" --

MR. BROOKS: May I interrupt for a moment, Mr. Camhy? You cited us Page 163 --

MR. CAMHY: No, 63.

MR. BROOKS: Would you give us a moment?

MR. CAMHY: Sure.

"Q Would you look at Exhibit 102, please, Mr. Arning, which is a memorandum dated May 13, 1970 from Fred Stock in respect of the possible combination of Blair and duPont?

"A Blair and duPont?

"Q Yes.

"A Yes, I see it.

"Q Did you receive a copy of that memorandum?

"A It was sent to me.

"Q Do you recall considering the problems raised by that memorandum?

"A I don't think they were given much. There wasn't any sense to this. It was an easy answer."

I would like to show the memorandum to the Court.

THE COURT: You have read it. I will --

MR. CAMHY: No, I was not reading from the memorandum. I was reading from testimony.

MR. POLLACK: If your Honor please, our opponents have no particular interest in this aspect of the testimony, but I think in fair context to the lawyers Mr. Camhy ought to read through Line 22, because this is the subject about which Mr. Arning testified a matter of minutes ago.

THE COURT: Well, as I heard his testimony, when he was asked a question here, he said he had no -- as I recall he had no knowledge of --

MR. POLLACK: In that respect I suggest that he read through Line 22, and you will see that he gave the same answer on his deposition. That's why I say I think fair context requires that Mr. Camhy complete the next

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several questions and answers.

MR. CAMHY: The memorandum indicates that it was sent to him.

MR. BROOKS: He didn't deny that, reading the memorandum. If you will read to the next page, down to Line 11, it says there he wouldn't have recalled it unless he had been shown the memorandum.

MR. CAMHY: Well, doesn't the memorandum indicate that it was sent to him?

MR. POLLACK: I think the question was whether Mr. Arning knew about the Blair-duPont merger.

The next series of questions and answers which Mr. Camhy did not read should be read.

If I may, with the permission of the Court.

MR. CAMHY: Well, I have no objection. My only attempt on this is to show that the memorandum was sent to him.

THE COURT: Well,Mr. Camhy, I have been misled because, as I heard it, I assumed that you were reading it for impeachment purposes, and I certainly accepted it as being appropriate for impeachment purposes, because it was different than what his testimony was here.

MR. CAMHY: Your Honor, my impression on the testimony was that he denied any recollection of the

whole event, and my only attempt was to show this memorandum which was sent to him on that subject; that's all.

MR. POLLACK: If your Honor please, merely in the interest of clarity, the next series of questions and answers are the question at Line 12:

"Q Do you recall considering the problems raised by that memorandum?

"A I don't think they were given much. There wasn't any sense to this. It was an easy answer.

"Q Yes, but evidently some people on the staff had been thinking about it.

"A Well, that's why there are V-Ps and other people, I guess. I don't recall it ever having been given really a lot of consideration.

"Q By you?

"A By me."

T3c

MR. BROOKS: May I continue your Honor?

MR. POLLACK: I believe that that is entirely consistent with what the witness had said a matter of minutes ago.

THE COURT: All right.

MR. POLLACK: I raise the point not because it affects out clients but because I don't think that what Mr. Camhy has done is consistent with the use to which he purports to put a deposition.

THE COURT: All right, thank you, Mr. Pollack.

MR. BROOKS: And if you read over halfway down the next page it becomes even clearer on the same point that Mr. Pollack is making your Honor and I join in his objection.

MR. CAMHY: The only point I wish to make is that to the extent that this memorandum is a stock exchange document which was sent to him and is on the letterhead of the exchange and has his name on it and deals with this subject it is something that apparently was brought to his attention and at least to the degree that he received this was considered by him.

THE COURT: Well, all right, if that was your purpose you had me in the dark about it. It seems to me that that purpose could have been very well served by showing him

that document and -- it is not a part of the record, or making it a part. But let's proceed.

MR. BROOKS: If Mr. Camhy is offering this I will object on the grounds of relevancy. I don't see what a Blair-duPont merger if it was considere by anybody has anything to do with this case.

MR. CAMHY: The memorandum does have this much to do with the case. It tends to show that senior officers of the exchange thought it had something to do with the mergers and they had some input about whether it should be encouraged or discouraged and they did consider the various economic effects of the mergers and whether it would strengthen these firms and whether to encourage them or discourage them.

MR. BROOKS: It might be relevant if Mr. Camhy was suing on behalf of investors of Blair, your Honor, but it is not here.

THE COURT: Let me see that, Mr. Camhy.

MR. CAMHY: Yes, sir (handing).

THE COURT: All right, I will receive it. I had thought that that was an area in which there would be no dispute. I had assumed that the stock exchange in view of this kind of a problem would of course take some responsibility for attempting to resolve it and to take

action to rectify it if they could. I didn't think there was going to be any dispute about that until Mr. Arning's testimony. I will accept it.

MR. HYDE: Mr. Camhy, I take it this is not offered with respect to Haskins & Sells.

MR. CAMHY: No, it is not but it needs a new exhibit number.

xx (Plaintiffs' Exhibit 261 received in evidence.)

THE COURT: Gentlemen, why don't we take a ten-minute recess.

(Recess)

BY MR. CAMHY:

Q Mr. Arning, during the 1969-1970 period wasn't there a program under way to help certain major firms which were having capital and operational difficulties? Don't you remember referring to that on your deposition?

A Well, yes, sir, I do. The problem with depositions though is the lawyer asks the questions and gets responses to those questions but never gets the context. I know what you are referring to and if I could take a liberty here of explaining it I will try to.

Q Okay. I would like to just insert two or three words to see if you could cover them and I have taken them from your deposition.

A Please do.

Q One of them is the concept of radical surgery that you used referring to what had to be done to some of these firms.

THE COURT: What kind of surgery?

MR. CAMHY: Radical surgery as what has to be done to some of these firms.

MR. BROOKS: I object to the question your Honor. We should be concerning ourselves with duPoint and not some of these other firms.

MR. CAMHY: Your Honor, I am trying to show that this merger formed part of his overall job in trying to see to it that certain major firms who were experiencing difficulties could be given whatever assistance--

THE COURT: Well, I think that's permissible, Mr. Camhy, but I don't understand, I think that's permissible but it does appear to me that you should be concentrating on what he didwith the two companies.

T4a

MR. CAMHY: I am. But I am only trying to make sure it is known this was part of his official duties.

THE COURT: Suppose it wasn't? What difference would that make?

MR. CAMEY: There is a contention in this complaint that the exchange did merely more than just stand by in this merger, that it knew about the merger and that it felt the merger was a good thing, and that it tended to observe the merger and encouraging the merger as part of achieving some objective that the exchange had in seeking to resolve duPont's operational difficulties.

THE COURT: I think argument over it will take longer than for you to ask the question, so ask it. The objection is overruled.

MR. BROOKS: I will save him the trouble, your Honor. I will agree Mr. Arning has put in the record proof of everything Mr. Camhy had just said, except that the exchange encouraged this merger and I think he testified he was neutral.

THE COURT: You concede that was part of his responsibilities.

MR. BROOKS: What was part of it.

THE COURT: Everything except the word encouraged.

MR. BROOKS: I concede it was part of his

responsibility to know what was happening, to enforce existing exchange rules.

THE COURT: All right. You may ask the question.

Q Mr. Arning, do you remember discussing a program during the year 196[illegible], '70, and continuing through '70, of dealing with certain firms who were experiencing major capital and operational difficulties, and do you remember referring to the fact some of them needed radical surgery, you were able to save some, not others, and you were proud of the fact that you did?

A Okay, with the caveat I had a moment ago, can I put that into my --

Q Yes, please.

A Forgive me, your Honor, I just think the background here is vital to the picture. For the record, the market low occurred in May of 1970, the bottom of the Dow-Jones average as a measure. I think if you look at volume it similarly hit its low point in May of 1970. My responsibility in an overall way relating to the department of member firms in light of the general experience that had occurred in the industry of operating losses in the latter part of 1969, and let's say the first quarter of 1970, then having been in the record, coupled with the fact that at some organizations a fair amount of their capital

was in securities form, the decline in the market value which had reduced their capital appreciably, the senior officials of the New York Stock Exchange, the head of the department of member firms, determined that a proper course of action would be in dealing with a very large segment of firms that may or may not earlier have had any difficulty, been asked to provide the exchange with details that would demonstrate to the satisfaction of the exchange their ability to operate at not less than a break-even basis, given the reduced volume that occurs in the second and third quarters most years.

So with that as the background, to the questions you asked me in the deposition, some of those firms elected, some John Cunningham elected, some Mr. Bishop and other coordinators of the department of member firms of the exchange worked with to accomplish these broad objectives I have just outlined. There were some you asked me about that I deal with, and they were just X number of firms. One of them was duPont. There were few in number that I handled. They were large firms. But that was what was involved in that.

Does that get to the background of that question satisfactorily?

Q Yes. Now, do you remember referring to this job as

something which in a jocular manner, but nevertheless with a certain amount of truth, got your hair that gray?

A I have a tendency to be that way, and I did, and I used radical surgery. I recall that term because I think you inquired what was necessary and the radical surgery related to the need for the member organizations in these areas to pare back, apply the surgery, which was the analogy I was using, to their operating costs then prevailing to get to a point where no matter what the cost was they could break even. The analogy is if you break even you are no longer losing capital.

Q I think you also conceded on deposition the merger route was the answer to certain firms' problems and it looked to you like this was to duPont.

A I don't remember the latter. I recall the former, a merger route would solve some of the organization's problems, but I don't recall the latter.

Q Do you recall also that you regarded the duPont merger favorably as being part of the solution to the problem? I think you said that, Mr. Arning. I will have to check now.

A I just testified, I think --

THE COURT: He just testified to that.

Q So that we don't have any problem with that?

A The record there is clear.

Q Wasn't the latter part of 1970, or wasn't all of 1970, a pretty difficult year for the exchange in terms of the possibility of major capital problems in very substantial firms? I am talking about Goodbody, Hayden Stone, duPont; you had a bad year on your hands that year, didn't you?

A Something like the vintners.

MR. BROOKS: I object to the question. I don't think it is relevant to duPoint. The other firms were after Dupont's.

THE COURT: The objection is overruled.

A May I have the question?

Q Didn't you have several major firms in trouble, capital trouble, Goodbody, Hayden Stone, duPont, Blair, and even to a slight degree Bache?

THE COURT: When?

MR. CAMHY: That year.

THE COURT: 1970?

MR. CAMHY: Yes.

A I don't know how to charactorize a period like a year, and things like member firms in general, but --

Q Didn't you tell me that was the year that made your hair gray? I think that's what you told me.

A I forget the point of rerence to that. But in any event, I won't dispute the fact that year was a difficult year in dealing with a number of member firms.

Q Isn't it a fact that if a major firm like duPoint went down it might take many other firms down with it because of the relationship in trades between them and inability to satisfy outstanding debts?

MR. BROOKS: Objection. No relevance to the issues in this case.

THE COURT: The objection is overruled.

A The question was--

Q If a major firm like duPont went down it might take other firms down with it because of its inability to satisfy debts as between firms. That is, there would be a major loss of confidence and a major inability to satisfy complaints for deliveries, moneys due, etc., and there would be a real problem that might affect many other firms.

A I don't know how to speculate on the scope of what might happen.

Q It would have been a problem of the first magnitude for the exchange?

MR. BROOKS: Same objection, your Honor.

Q Didn't you have Goodbody trouble at the same time?

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THE COURT: I am overruling the objection to the question that you have asked. Now, withdraw one of the questions, in any event.

MR. CAMHY: I will withdraw the last question.

Q In the light of duPont's relationships with many other member firms in Exchange transactions and other commercial transactions, and in the light of the numerous customers that duPont had all over the country, wouldn't its liquidation or failure have caused very substantial problems for the securities industry as a whole and the New York Stock Exchange in particular?

MR. BROOKS: Same objection.

THE COURT: The same ruling.

THE WITNESS: Well, your Honor, I find great difficulty sitting here in 1975 to speculate what might have occurred at a given point in time. I do think your record ought to show that the resources of the Exchange in many cases are substantial in terms of people and in terms of inventiveness, and I, sitting here, out of the blue can conceive that we might very well have established a number of interim-type of clearances to settle a lot of the inter-broker problems, were those type of things to arise, but never having hit the light of day, to try to answer that strains my ability.

What we would have done, I don't know. We sure would have had to work at something to do it.

Q You sure would have had a big problem, wouldn't you?

A We would have had to solve a problem.

THE COURT: I didn't understand the question to be directed to that. I thought the question was to talk back to 1970.

The question was whether or not, if there was a failure at duPont,as to whether that wouldn't have caused some major upheaval, or whether you considered it as such in the industry, and not speculation, but your thinking at that time.

THE WITNESS: Your Honor, if I may, counsel has already pointed out there were other firms that occurred that year. All of those were resolved. There was no loss to customers of anything.

So let's put the duPont thing at the front of that chain, and say that would have been one of the others that would have been solved.

Q Yes, but they were resolved either through saving the firm somehow, or by something that existed then, and that was called the trust fund; isn't that right?

A Well, the manner in which they were resolved

did vary, sure.

Q Didn't you tell me on deposition that you had spent $84 million of the Exchange's money in satisfying various claims out of the trust fund for firms that had failed?

A Whatever the number is is clearly in the record and it's substantial.

Q Wasn't it around $84 million? Didn't you tell me that?

A I don't recall the number I gave you then, sir.

Q Was it close to $84 million?

A It's large, very large.

MR. CAMHY: Your Honor, I have $84 million in the deposition. I must say when I read it I was shocked, I didn't realize it would be that large.

THE WITNESS: It's in the annual report. The deposition was a year ago. I don't remember the number.

MR. CAMHY: I questioned people whether the stenographer had mistranscribed it, but they assured me that was the number testified to.

THE WITNESS: A rather substantial effort was made, no matter what the number.

MR. BROOKS: We are a long way from a disclosure case in July of 1970.

Q I just want to make this firm.

The Exchange did spend numbers of that magnitude in satisfying the claims of other firms that had gone down, isn't that so, out of the trust fund?

A Yes. Whatever that number is.

Q What were the total commitments of duPont at this time?

A I am afraid I don't know.

Q Do you know that it exceeded hundreds of millions?

A I don't know what you mean by "commitments."

Q Obligations.

THE COURT: I am at this point inclined to agree with Mr. Brooks. I don't think this has any relevance to this case at all.

I disagreed with him before, because it does seem to me that the actions that the Exchange took in its concern about the industry was within the area of this litigation, at least for me to understand what's involved, but that they paid off claims in an attempt to save the public in some context I don't think has any relevance to this case.

MR. CAMHY: I suggest, your Honor, that the reason the paying of claims is relevant is because they

paid off claims because they felt that that was necessary to preserve the institution of the Exchange, and that in the duPont case they realized that with two or three like these, there would be no money, there wasn't the kind of money to pay these claims.

THE COURT: That is highly speculative, Mr. Camhy.

They paid off claims, and I assume that they felt that that was their public responsibility.

MR. CAMHY: Until they ran out of money, your Honor, and I am suggesting they would have run out six months sooner, and would have had SIPC six months sooner if duPont had gone down then.

THE WITNESS: May I ask a question, your Honor?

THE COURT: Without having one put to you, Mr. Arning, I prefer not.

MR. CAMHY: I have only one more question, your Honor.

THE COURT: All right.

Q In your work in duPont, did you rely on Haskins & Sells for information as to operations of the firm during that spring to any extent?

A During that spring?

Q Yes.

THE COURT: You mean the spring of 1970?

MR. CAMHY: Yes, sir.

Q Did you rely on Mr. Lill of Haskins & Sells as I think you said your eyes and ears?

A Yes. I am trying to get the same time period in focus. Haskins & Sells was helpful to me and to the Exchange in the course of using its audit functions at duPont, and Hirsch, and everybody else.

Q As a source of information that spring?

A I met with Ed Lill, yes.

Q And did you try to get from him -- did you use him as an informational source as to the operations there?

A Mr. Lill was helpful in every respect.

MR. CAMHY: That's all I have, your Honor.

THE COURT: Mr. Brooks, do you want to question the witness?

MR. BROOKS: I have no questions of this witness, your Honor.

THE COURT: Mr. Hyde?

CROSS-EXAMINATION

BY MR. HYDE:

Q Mr. ARning, with respect to the last few questions concerning Mr. Lill, when you said "that spring," can you

distinguish between the period before and after the duPont merger of July 2, 1970?

A In what way?

Q With respect to the services rendered by Mr. Lill?

A I met with him on a continual basis, or I did then.

Q What did these meetings consist of?

A At one point we formalized them rather substantially, it seems to me, and I think I wrote Haskins and asked them to do rather specific things, but prior to that why, I think we met, I don't know whether it was on a regular basis, but frequently, to review with Ed the status of recovery efforts, research, and so forth.

Q I show you a letter you wrote, I believe, put in evidence as Plaintiffs' Exhibit 232, a letter dated August 4, 1970, and ask if that's the letter you have in mind.

A Yes. Without reading all of it, this is the letter. That's the formal assistance that we sought.

Q And that was commencing in August of 1970?

A I believe so, yes.

MR. BROOKS: Excuse me, Mr. Hyde. We don't have that being received in evidence.

THE CLERK: It wasn't.

MR. HYDE: I may be in error. I thought it was. I believe it was shown to Mr. Lill in his testimony yesterday. I thought it had been offered and received.

MR. BROOKS: I have no objection to it going in evidence.

MR. HYDE: I have no further questions.

THE COURT: Any questions?

MR. POLLOCK: No questions, your Honor.

MR. CAMHY: No further questions.

THE COURT: Thank you, Mr. Arning.

(Witness excused)

MR. CAMHY: May we approach the bench for a moment?

(At the side bar)

MR. CAMHY: I misjudged my time and I have run out of material, and I would like to be able to start first thing in the morning. I don't know where to go from here now.

MR. BROOKS: We have Mr. Bolos and Mr. Bishop standing by for Mr. Camhy to call. They have been in the back of the courtroom.

MR. CAMHY: I won't need Bolos.

MR. BROOKS: Can I excuse Mr. Bishop?

MR. CAMHY: Yes, but I won't need him until Monday.

MR. BOOKS: Why not have him now?

MR. CAMHY: I can't. If I start with Mr. Bishop, I could never finish with him this afternoon.

MR. BROOKS: Pick up tomorrow. Mr. Bishop is scheduled to go to the West Coast.

THE COURT: This case has gone on, and I really think if you are going to use Mr. Bishop you ought to use him now. He is here.

MR. CAMHY: He was here as an observer for several days. We couldn't get him out, as I recall, for awhile.

THE COURT: He is available now, and there is an hour left. I have another matter at 5:00 o'cloc' I want my time used.

MR. CAMHY: I understand that, your Honor.

THE COURT: Therefore, if he is here and you are going to use him, I think you ought to use him now. If you don't want to use him now, then don't use him.

MR. CAMHY: Very well, your Honor.

(In open court)

MR. CAMHY: Mr. Bishop, please.

MR. SPINOGATTI: Yes, sir.

THE COURT: And what are you asking him to do?

MR. SPINOGATTI: I am asking him to describe for the Court the procedures by which the assets and liabilities designated in section 3 were transferred, your Honor. You will see that section 3 indicates that they were in fact transferred, it's a receipt for that, and Mr. Norman has testified that he was a member of the liquidating committee and that agreement provides that the liquidating committee was to do that transferring.

MR. HYDE: Your Honor, I fail to understand the relevancy of this line of inquiry.

THE COURT: I am not prepared to at this point rule on that, but what I was trying to find out was whether what he is asking him to describe is described in the agreement itself. If it's described in the agreement itself, then I can read. I don't really need any testimony.

MR. SPINOGATTI: No, your Honor, it's not described in detail in the agreement. If you would like me to respond to that objection I will. I was trying to save some time.

THE COURT: No, that's all right. I will

hear Mr. Norman if he is going to testify as to something that's not in the agreement.

MR. SPINOGATTI: Yes, your Honor.

Q Mr. Norman, would you like the question repeated to you?

A Yes, please.

MR. SPINOGATTI: Mr. Reporter, would you please read the question back.

THE COURT: I think to save you some time I think the question was as I recall it, how were the liabilities that are described in the agreement transferred.

MR. SPINOGATTI: And the assets, your Honor.

THE COURT: And the assets.

A A couple of days before the transfer of assets and liabilities which were supposed to be transferred as of July 2, 1970, an account was established on the books of Hirsch & Company called the omnibus account. This account was to be used as a conduit to transfer the assets and liabilities of duPont.

As of the close of business July 2, 1970 and the early morning hours of July 3rd based on instructions previously given, the designated assets and liabilities were transferred by the IBM computer into the omnibus

account, and then on to duPont.

Q Mr. Norman, in front of you on the table there is a large green book which has been premarked as Plaintiff's Pretrial Exhibit 260, and I ask you if this is the run of that computer which accomplished what you just described.

A Yes, it is.

MR. SPINOGATTI: Your Honor, I would not to the Court that because of the size of that document I have not provided copies to counsel for defendants. However, I advised them of its existence and it has been available for them to view.

Q Mr. Norman, did the omnibus account after the entry of all the designated assets and liabilities have a debit balance or a credit balance?

A Debit balance.

Q Do you know as you sit here what the exact amount of that debit balance was?

A I don't know the exact amount but I think it's about a million nine hundred thousand.

Q Let's see if we can refresh your recollection a little bit as to the exact amount. Would you examine the closing summary entry in Plaintiffs' Exhibit 260? I believe we marked the page with a little slip of

paper.

A Yes.

Q Does that refresh your recollection as to the exact amount of the debit balance in the omnibus account at that time?

A Yes, it's $1,910,440.82.

MR. SPINOGATTI: Your Honor, I submit Plaintiffs' Exhibit 260 be admitted in evidence.

MR. HYDE: The entire volume?

MR. SPINOGATTI: The entire volume.

MR. HYDE: Your Honor, apparently it's offered just for one figure. Why do we need this massive volume in the record?

MR. SPINOGATTI: Your Honor, this book lists all of the assets and all of the liabilities which were assumed by F. I. duPont Glore Forgan & Company. A portion of that debit balance which I have described was credited by F. I. duPont Glore Forgan & Company to each of the individual plaintiffs and forms a part of their investment. I'd like the record of all of those assets and liabilities deemed transferred by duPont Glore Forgan Company deemed in evidence.

MR. HYDE: I have no objection to a particular figure going into evidence, your Honor, but

I do object to this volume.

THE COURT: I must confess that I have some problem with it myself merely in terms of we don't really anticipate that that's relevant enough for me to pore through that entire volume.

MR. SPINOGATTI: Your Honor, my only --

THE COURT: Let me make a suggestion to lessen some of the work. I would prefer, frankly, for you to -- whatever information is in there for you to condense it in some form and then make it part of the record. It would appear to me that if there are some figures in there that you feel are important that counsel can agree on that and without my having to try to wade through a volume like that.

MR. SPINOGATTI: Well, let me suggest this, your Honor: Would counsel for defendants stipulate that the debit balance in that account was the number which Mr. Norman read out and that that was the debit balance of the assets and liabilities transferred to F. I. duPont Glore Forgan & Company?

MR. GILLESPIE: Your Honor, I have to go look at it before I could so stipulate. I am going to have a similar problem and I see no reason why they could not Xerox that single page as I would plan to do

with these documents.

THE COURT: Yes, but he wants more than a single page, Mr. Gillespie. What he wants, he wants a summary of various accounts and at least he wants that to be before the Court for whatever reason. I think there may be some justification for that, but I think it ought to be able to be done in a way that would be less burdensome for, at least for me, I am thinking about myself at this point.

MR. SPINOGATTI: Your Honor, I will adopt Mr. Gillespie's suggestion for the time being, and perhaps if we can mark it as Plaintiffs' Exhibit 260 in evidence, the last page of this, which I will have Xeroxed and if we later on wish to --

THE COURT: Is that all you need?

MR. SPINOGATTI: For the time being it's all I need, your Honor.

THE COURT: All right, fine. We'll do it that way.

MR. SPINOGATTI: All right, fine.

THE COURT: If you determine that you want further information in it then we'll do it then.

MR. SPINOGATT: That really depends to some extent on the case of the defendants, your Honor, as you

realize.

THE COURT: All right.

MR. SPINOGATTI: In view of the suggestion I move that the last page of Plaintiff's Exhibit --

THE COURT: Well, there is no objection to that. Let's proceed.

MR.SPINOGATTI: All right, fine.

(Plaintiffs' Exhibit 260, last page, was received in evidence)

BY MR. SPINOGATTI:

Q Mr. Norman, if you can pick up Plaintiffs' Exhibit 1 in evidence once again, I direct your attention and the attention of the Court to section 5 of that agreement and in particular to subsection A.

Do you recall the dollar amount which was credited to the capital accounts of the former general and limited partners of Hirsch & Co. in the aggregate who invested in F. I. duPont Glore Forgan?

A I don't know the exact amount, but I think it's about $1,800,000.

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T1b

Q Mr. Norman, let's see if once again we can get the exact amount. Would you please examine Plaintiffs' Exhibit 254 which is not yet in evidence but which is in front of you.

Mr. Norman, do you recall receiving Plaintiffs' Exhibit 254 during the ordinary course of your business as a member of the Hirsch & Company liquidating committee?

A Yes.

Q I direct your attention and the attention of the court to schedule 2 which is the last page of that exhibit. Mr. Norman, are you looking at schedule 2?

A Yes.

Q Does that refresh your recollection as to the exact dollar amount credited to the capital accounts of the former general and limited partners of Hirsch & Company investing in F.I. duPont, Glore Forgan & Company in the aggregate?

A Yes, it does.

Q Would you tell us what that amount was please?

A $1,856,290.

MR. SPINOGATTI: Your Honor, I offer Plaintiffs' Exhibit 254 into evidence.

MR. HYDE: No objection, your Honor.

MR. GILLESPIE: Your Honor, I am not sure that he's

identified any other thing in here besides the second page of the schedule which I have no objection to. But I don't know what the rest of the exhibit includes, and whether the witness knows anything about the rest of this exhibit.

MR. SPINOGATTI: Well, he received it, Mr. Gillespie. Your Honor, if you would hold up your copy you will see that is one booklet and I would rather not cut booklets in part to submit them.

MR. GILLESPIE: One piece I have no objection, your Honor.

THE COURT: All right, it is received.

xx (Plaintiffs' Exhibit 254 received in evidence.)

Q Mr. Norman, I direct your attention to Plaintiffs' Exhibit 262 which is not yet in evidence but which is also on the table in front of you. Did you prepare that document, sir?

A Yes, I did.

Q Were you requested by F.I. duPont, Glore, Forgan & Company to advise them of the apportionment of the $1,856,290 among the former general and limited partners of Hirsch & Company who were investing in F.I. duPont, Glore, Forgan & Company?

A Yes, I did.

Q Does Plaintiffs' Exhibit 262 which is in front

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of you indicate that apportionment?

A Yes, it does.

Q What was the portion of the $1,856,290 which was credited to the capital account of Mr. Mundheim?

A $578,050.

Q Mr. Norman, what was the portion of the $1,856,290 credited to the capital account of Mr. Kohns?

A $472,020.

Q What was the portion of the $1,856,290 credited to the capital account of Mr. Hirsch?

A $70,950.

MR. SPINOGATTI: I offer Plaintiffs' Exhibit 262 in evidence.

MR. HYDE: Your Honor, I have no objection except that it seems to add nothing. The two figures which are relevant, three figures, have been read into the record. Here we have an exhibit which is barely legible with a lot of extraneous matter. I don't see what purpose this serves by putting in exhibits of this sort. We will stipulate to the figures. There is no dispute in the case as to the amount of credit that was given to these plaintiffs.

THE COURT: Is that satisfactory?

MR.SPINOGATTI: I will agree to that stipulation, your Honor.

mh4 Norman-direct

THE COURT: All right, that settles it.

MR. GILLESPIE: I agree, your Honor.

THE COURT: I was about to ask. What about you, Mr. Pollack?

MR. POLLACK: We have no objection on that, your Honor.

THE COURT: All right.

xx (Plaintiffs' Exhibit 262 received in evidence.)

Q Mr. Norman, did you personally handle the administrative details of the investment by the individual plaintiffs, Mr. Mundheim, Mr. Kohns and Mr. Hirsch in F.I. duPont, Glore, Forgan & Company?

A Yes, I did.

Q In addition to the crediting of the respective capital accounts which we have just discussed, did each of the individual plaintiffs make an additional cash investment in F.I. duPont, Glore, Forgan & Company for which you handled the administrative details?

A Yes, I did.

Q Would you describe to the court the manner in which that investment was made?

A The individual partners owned a Panamanian company that was called Hirsch & Company, S.A.

Q Excuse me, Mr. Norman. All of the individual

mh5 Norman-direct

partners of Hirsch & Co.?

A All the individual general partners.

Q Thank you, Mr. Norman, I'm sorry, go ahead.

A Just prior to July 2nd the Panamanian corporation was liquidated and a substantial portion of its assets were distributed to the general partners. Hirsch & Company, S.A. drew checks on its own bank accounts and distributed them to each of the partners, including Messrs. Kohns, Mundheim and Mr. Hirsch. Messrs. Kohns, Mundheim and Hirsch deposited their individual checks into their own bank accounts and drew checks payable to F.I. duPont, Glore, Forgan & Company for a like amount. These checks were subsequently, I believe on July 2nd or thereabouts, were delivered to F.I. duPont, Glore, Forgan.

Q Mr. Norman, I direct your attention to Plaintiffs' Exhibit 250 which is not yet in evidence but which is on that table before you. Did you receive a copy of that letter, Mr. Norman?

A Yes, I did.

Q Is that the transmittal letter used to send checks to F.I. duPont, Glore, Forgan & Co. which are the checks you just described?

A Yes, it was.

MR. SPINOGATTI: I offer Plaintiffs' Exhibit 250

in evidence.

MR. HYDE: Your Honor, we can stipulate to the three figures here. I don't think we need the checks and transmittal letter. There is no issue in the case with respect to the amounts of money that the plaintiffs invested in this form.

MR. SPINOGATTI: Your Honor, I will then with the court's permission and the consent of counsel read the numbers into the record.

THE COURT: All right.

MR. SPINOGATTI: A check of Mr. Hirsch was for $329,050. Check of Mr. Kohns was for $427,098. And the check of Mr. Mundheim was for $321,950. In view of the stipulation, your Honor, I have no further questions of this witness.

THE COURT: Mr. Hyde.

MR. GILLESPIE: Mr. Hyde has asked me to go first, your Honor.

CROSS EXAMINATION

BY MR. GILLESPIE:

Q Mr. Norman, how long were you at Hirsch & Co. before you became a member of the Hirsch & Co. liquidation committee?

MR. SPINOGATTI: Objection, your Honor. There

mdh2 Norman-cross

has the obligation of reading in and impeaching the witness' testimony before proceeding on a lengthy set of questions.

MR. GILLESPIE: I am about to do so.

THE COURT: He is about to read the question and answer that he feels is inconsistent with his testimony here.

Q On pages 32 and 33 -- excuse me, pages 34. I apologize.

"Did you ever do any work for Hirsch & Co. in analyzing or obtaining information in respect to a potential merger or some arrangement with another brokerage firm?

"A No, I did not.

"Q Does that answer pertain to the merger discussions and the eventual transaction that was entered into with the duPont firm in 1970?

"A No. The only one that I had done, if you call it work, was Frank Garibaldi and I were discussing the potential merger with the duPont firm and he asked me to take a look at some figures, and I looked at them, made a cursory review, and I think I must have looked at one or two financial questionnaires. I don't remember the dates, and I think I saw an analysis of duPont subsidiaries. The accumulation of financial credits and debits. I think

THE COURT: I will allow that. Since you were apparently caught by surprise, I will allow that deviation from the rule, although I must confess I don't see how you could have been. You should have known with the deposition this was going to be asked.

MR. CAMHY: We felt the payment of the price and crediting was a sufficiently discrete item so that it wouldn't be an occasion for going into all of this except if they called him.

Q Do you remember the question last put to you?

A Yes, I do.

Q Could you answer the question?

A Yes, I talked to Mr. Mundheim. I was negative about the merger.

Q You were negative about the merger?

A Yes. I told him that --

Q Tell us what you mean when you say you were negative about the merger?

A I didn't like the merger, and -- well, you might say I was against the merger.

Q Did you tell Mr. Mundheim why you were against the merger?

A I don't recall whether I did or not.

mdh2 Norman-redirect

was able to assemble, did you ever see what I will show you now, which is Exhibit 109, a capital computation as at the audit date?

A No.

Q Were you aware that duPont had been computed as at 3,200 per cent ratio on its last audit date?

A No, I was not aware of it.

Q When did you first become aware of it?

A I think just possibly the last couple of days, a week.

Q Did it come as a surprise to you?

A Yes.

Q Do you remember what you said when you were told it?

MR. HYDE: Objection, your Honor.

THE COURT: Objection sustained.

Q Did Mr. Garibaldi's papers have anything like that in them, Exhibit 109?

MR. HYDE: Objection, your Honor.

Q The ones you saw.

THE COURT: The objection is overruled.

Q This 109, did you see this, the 3,200 computation?

A No, sir, I did not.

Q I show you Exhibit 112 which is the material inadequacies letter of November 26, 1969. Was that among

in financial matters.

Q Did a time come when Mr. Kohns and Mr. Mundheim, or one of the partners at Hirsch & Company, asked you to collect some information and facts on duPont with a view to possible merger?

A Yes.

Q Did you do that?

A Yes.

Q Did you do that?

A Yes.

Q Did you endeavor to report those facts insofar as you could find them to the partners at Hirsch & Company?

A To Mr. Kohns and Mr. Mundheim, yes.

Q Did you furnish them with your opinions on the merger?

A I put nothing in writing. Just oral discussions with Mr. Kohns.

Q In your oral discussions did you give your own opinion as to whether you thought the merger was good or bad?

A Not specifically I didn't say it was good or bad. I don't remember making that definite statement.

Q But you do recall there were a number of negative facts you brought to their attention?

A I brought facts to them. Whether it was negative or not, someone would have to make a judgment decision on that.

Q In connection with your work in this regard did you ever see or were you shown this Exhibit 109, which is a capital computation prepared by Haskins & Sells as at the last audit date?

A No.

Q Do you notice the ratio shown on that computation as of the audit date?

A Yes.

Q Were you aware that duPont had been computed as having that ratio by the auditors on its last audit, 3200?

A No.

Q Were you ever made aware of the fact that the exchange had made recomputations of this audit date status in reference to rule 325, and had come up with a ratio in the tens of thousands, 76,000?

A No.

Q Were you ever made aware that by the exchange's computation the capital deficiency on the audit date was

approximately 17 million?

A No.

Q Were you ever made aware that during the period December and January approximately $6 million worth of securities in the long differences accounts od duPont were sold and used to replenish capital?

A No.

Q Were you ever shown this material inadequacies letter, which is Exhibit 112?

(Handing to witness)

A No.

Q Were you ever made aware that a material inadequacies letter had been written as at the last audit date for duPont?

A No.

Q You did know, however, that there were substantial differences which indicated a back office problem, is that right?

A Yes. In answer to the question 13 of the questionnaire, it listed the securities differences.

Q Weren't there approximately 10 million short securities differences and 10 million long on the more recent questionnaires in the spring of 1970?

A I don't remember the amount, but the figures

investigation. I want to find out what he did. You haven't asked him that.

MR. CAMHY: All right.

Your Honor, I had assumed all of this was going to be brought out on cross-examination. I brought him here for that purpose.

THE COURT: I am sure it is, but the point is I want it in a framework that I will get affirmatively precisely what he did do.

MR. CAMHY: All right.

Q Mr. Gariboldi, would you tell the Court, and try if you can to put it -- if you still can -- in a chronological frame to this two-part negotiation that they had -- would you tell the Court what your activities were in carrying out this assignment of getting facts and relaying facts to the Hirsch partners about this merger, and to the best of your ability tell the Court what instruments and calculations you did look at, and what recollection you have of them.

A In the early part of 1970, January, February, Mr. Mundheim, Mr. Kohns, called me in and said they were contemplating a merger, or they were having a discussion with duPont, and would I look at some financial documantation.

T5B

MR. HYDE: Let me rephrase the question then, your Honor. I think it probably already is in.

Q I believe you testified with respect to the documents that you asked for. Let me ask you this: Did you ever ask for any documents that you did not receive?

A No, I received every document that I asked for. Whether I got them a day later or a week later but I received the documents that I asked for.

Q You got them.

A Yes, sir.

Q Now was there any document that you considered necessary and appropriate to the evaluation of the financial condition of Francis I.duPont which you did not ask for?

A I would say no.

Q Everything in other words, that you thought you needed you asked for it and you got it, is that correct?

A That's correct.

Q I think you testified with respect to seeing certain special operations questionnaires. Could you tell us what those are?

A Well, if you had the document here then everyone could look at it or we could discuss it.

Q I was thinking more in general terms, Mr. Gariboldi.

mh5 Gariboldi- cross

MR. CAMHY: If you have one that is a Haskins & Sells Gariboldi Exhibit I can represent we tried to keep his file intact and whatever came out that way is something that we found in the file.

BY MR. HYDE:

Q We are trying to resolve this question, Mr. Gariboldi. Let me go on. You testified I believe that in your review of certain special operations questionnaires you took note of the fact that no charge was being made to capital by reason of securities differences, is that correct?

A Yes.

Q Did you make any computation which would indicate to you what the result would be had securities differences of duPont been taken into effect?

A You wouldn't have to make a computation if you just look at item I, subtract item 2-A-2 from that and you would have a deficit of five million dollars just looking at this document. You don't have to make--

Q The capital deficiency is apparent on the face of the --

A Just looking at it. You don't have to make any computation just based on the document right here.

Q It shows that the firm is in deficit and out of

anything out.

Q I thought it strange at the time.

A Yes.

Q I have no problem with your changing your testimony.

A My answer to your question is the long values are not included in the capital computation. You do not increase the net capital for the market value of the long.

Q Your practice at the time was to charge the full short values?

A Yes.

Q You had observed that duPont was doing it differently, ignoring the short value as a charge?

A I noted that, and I spoke to Mr. Lill, as I testified before, and Mr. Gentile. They said that duPont had special dispensation from the New York Stock Exchange in computing capital in an alternate way excluding those items.

Q Did you advise Mr. Kohns and Mr. Mundheim of that?

A Yes.

Q To your knowledge, did they know what the treatment for those items was at Hirsch & Company as computed by you? They knew you charged the shorts?

I think it was clear but I just want to make sure. Hirsch itself was not in capital trouble, the Hirsch Company, in June of 1970, was it?

A No, they were not.

Q So that when Mr. Brooks asked you whether the charges that were absorbed placed a burden, a net burden on capital it was because a lesser number of Hirsch partners went in and put in less capital, is that right?

A If that was the reason, the answer would be yes.

Q But it is only because so many dollars of capital went in and all of it -- or much more aggregate indebtedness went in in the merger.

A Yes.

Q But the Hirsch Company itself was not in any problem about capital compliance?

A No.

MR. CAMHY: Your Honor, that is all I have of the witness.

THE COURT: Do you have something on this cross examination, Mr. Hyde?

MR. HYDE: Yes, I do, your Honor.

THE COURT: All right.

MR. HYDE: It is on this footnote that came out on cross examination after I had concluded.

t4b

Q Thank you.

Did the firm have a back office?

A Yes, a very substantial one.

Q Did you do anything with back office operations? Were you back there at all?

A I had it -- it was my responsibility, the partners looked to me for the correct running of the back office. I had no bookkeeping experience and never acquired any. So I needed an assistant to do the actual managerial job and my function was to make common sense decisions on problems brought to me.

Q Did the firm have accountants?

A Yes. For many years they were Haskins & Sells, and prior to that a small firm whose name at the moment escapes me.

Q Who at Haskins & Sells did you deal with?

A My relations were largely with Mr. Petrillo.

Q Did you see him on important matters?

A Yes, I considered him a valuable consultant and got on very pleasant terms with him and did not hesitate to go to him with problems or suggestions.

Q Did Haskins & Sells do the Hirsch & Company tax returns for the partnership?

A Yes, sir.

Q Did they do your personal tax returns as well?

A Yes, sir.

Q So your personal tax return and the partnership tax return was with Haskins & Sells?

A Yes, sir.

Q Did you consult Mr. Petrillo on matters other than matters relating to your audits?

A Yes. Mr. Petrillo was very sophisticated in terms of Wall Street operations, and I went to him to get impressions of what other houses did to solve certain problems that we might have without asking him to disclose the names of the firms. And he was very useful in that regard.

Q In connection with the tax returns did you get tax advice, that is to say were they just simply filling out the returns or were they giving you advice as to how to keep your taxes lower than they might other be if you couldn't get the advice?

A Yes, most specifically perhaps when we formed our affiliate Hirsch & Company, S.A. and there we got our advice from their tax department and the partner in charge of the tax department, Mr. Petrillo I think sat in at the decisive meetings but he did not consider himself a tax authority.

Q Now, did a time come in the latter part of 1969 and the early part of 1970 when the firm began to consider

Q Stop right there. First you apparently were on some kind of a merger -- serious merger quest, weren't you?

A Yes, I had come to the conclusion shared by some of my partners that there was no place in the future of the industry for a firmof our size, that we were large enough to need very extravagant electronic data machinery and the volume wasn't sufficient to support it.

So our feeling was that our choice was to either join a firm substantially larger than we were or to shrink our own operations markedly.

THE COURT: Well, can you tell me en you reached that conclusion?

THE WITNESS: During 1969 when black figures began to disappear and red figures became too prominent.

Q How about the age of Mr. Hirsch?

A He is four or five years older than I am. Four, I think.

Q Didn't he indicate a desire perhaps to retire in the next year or two?

A Yes, he had been showing for some years that desire, but felt that he had an obligation to his partners and to the fact that the firm was founded by his father, not to embarrass us until an appropriate time should come.

Q There was always the question of death, wasn't there?

A There was always that possibility, of course.

Q That would have given you an estate and perhaps the possible withdrawal of that capital, isn't that right?

A Yes. That was oneof the reasons. Not his age, but my own age and the fact that any young man is subject to being hit in the street.

Q Would you go on?

Did you have some good young men?

A Did we have some what?

Q Good young men?

A Yes, we did. But their capital was not as substantial as we would have liked.

Q Was Maurice Meyer pressing you to get his money out?

A No.

Q But he did change from one class to another of investor, didn't he?

A He did at the end of 1969.

Q Did that have some implications to you somewhaet on the horizon?

A Yes, but our decision, or, our thinking towards merger were almost a year old when the time came of which

house had to give the other.

Q Can you fix the time of this? Was it January, February, March?

A I am sorry, I cannot.

Q Well, let me give you an event to fix it with. There must have been very big publicity attached to the duPont censure for the complaints and the record keeping in the latter part of January, February.

Do you know whether you knew that at that time or whether you learned it shortly thereafter?

A My belief is that I learned it thereafter.

Q But you did learn it?

A Yes.

Q And you learned it some time before the merger?

A Yes.

Q All right. Go on.

A We parted with the idea that Latour would talk to Framen and Latour's report to Framen was that they were interested in pursuing the discussion seriously. And we did.

Q Was it at that point that you enlisted Mr. Gariboldi?

A Yes, it was. Mr. Mundheim asked Mr. Gariboldi to come into his office and asked me to join them as I remember

of the negotiations you wanted to hear. They ended up in agreement.

Q When did Glore come into it?

A When did who?

Q Glore Forgan. That would be a three-way. Was it at this time or later?

A I have only a vague recollection of the answer to that question.

Q All right. Now does the time come when you did discuss the matter with Petrillo?

A Yes. It was at about the time -- the time I am discussing must have been, I suppose, in May, perhaps late in May. And when we had gotten fairly close to an agreement, in other words, where the negotiations had proceeded further, I asked Mr. Petrillo to come in and I asked Mr. Hirsch and Mr. Mundheim to come in and I think Mr. Framen was there. Possibly another partner but I remember Mr. Hirsch and Mr. Mundheim. And I remember clearly that I said to Mr. Petrillo,"Pete, as you undoubtedly know, we are rather close to an agreement to join duPont, what do you think of it?"

And he said, "Paul, if they can get good back office management,"I think he said good management and I assumed he meant back office management,"I think it will be good,"or,

"It will work out well."

And he said, "By the way, Edmond duPont is a man whose word is better than his bond."

Well, I felt a recommendation like that coming from a man whose judgment and knowledge I respected and who was duPont's auditor was a very importing go-ahead signal. And --

Q Now, by this time had you gotten the comments of Mr. Gariboldi about the down side risks in these --

A I believe so, yes.

Q -- and the securities different short?

A I believe so, yes.

MR. POLLACK: I object to the form of the question, your Honor.

THE COURT: Overruled.

Q Do you recall any other meetings -- I think Mr. Gariboldi mentioned a meeting at which he was present with Mr. Petrillo. Do you remember that meeting?

A Not clearly. Rather vaguely I do remember it and I don't remember the substance of it or who was present.

Q Is there any other event that stands out in these negotiations going up to the closing?

A Well, there was a very h-ctic --

Q Well, let me ask you something, how about this

duPont standby. By the time you got to the closing of this thing did you know whether there was a legal commitment in respect of the standby capital for $20 million? Was there a --

A Oh, yes, at the meeting at Mr. Mundheim's home I addressed Mr. duPont and said I would like to ask a question which you may feel you would not care to answers. And he said,"Mr. Kohns, I can't think of any question you will ask me that I am not happy to answer."

And I said, "I understand that your firm has a $20 million standby agreement should you need additional capital."

He said, "That is true. However, we have already used $2-1/2 million of it and there is $17-1/2 million available." I think he mentioned it came from a trust in which I think he said his family was involved. And then I thanked him and said, "Mr. duPont, I would like to ask one other question which also you may feel is out of order," and he said, "Please do."

And I said, "In the unlikely possibility that the firm should need more capital than this standby agreement, what plans have you for achieving more capital?"

And he said,"Mr. Kohns, I can only tell you that I have never come back from Wilmington empty-handed."

Mr. Kohns.

A Oh. And what was the last question on that?

Q Mr. Kohns, can we now go back. I am asking you whether you knew, first, that on the audit prior to the merger the Haskins & Sells ratio as computed by them was approximately 3,200? Did you know anything like that?

A No.

Q I am next asking you whether you knew that prior to the merger and before the negotiations started that previous December the Haskins & Sells 3200 ratio was re-examined by the Exchange and that the Exchange found it to be well into the tens of thousands?

A No.

Q Did you know that the Exchange prior to the merger had found a capital deficiency of approximately $17 million?

A No.

Q Did you know that the firm had taken securities which it had found in its long differences and used it and sold it and used the proceeds to be put into capital?

A No.

Q Did Mr. Gariboldi ever tell you anything like that? Did he ever tell you those things?

A No.

Q Isn't it a fact that you learned many of them in the

T1B

Q Mr. Kohns, what year is the first year that you can remember during the years that you were at Hirsch & Company that the firm had an operating loss?

A '69 is the year that occurs to me. I think there may have been one previous year in the '30s perhaps.

Q During the depression?

A Yes. There may have been, I am not sure that that is true.

Q Do you recall what the loss was for 1969?

A Approximately a million nine.

Q Let me show you a copy of Haskins & Sells Trial Exhibit Q. I call your attention to the loss shown on the front of that page which is the 1969 partnership income tax return, and ask you if that refreshes your recollection as to the amount of the 1969 loss (handing).

A I don't understand tax returns well enough to-- it is a greater loss than I stated, but the explanation for the difference I am unable to give you.

Q Did you sign the tax return submitted by the partnership to the Internal Revenue Service?

A I believe so.

Q Did you understand them in their basic substance when you did sign them?

A I really don't know how to answer that question.

mh8 Kohns-cross

A I am not clear. You asked him about April and May --

MR. BROOKS: April and May.

THE COURT: Is this the loss for five months--

MR. BROOKS: Yes, sir.

THE COURT: Or for two months.

MR. BROOKS: It is for five months and you determine for April and May by subtracting Exhibit F from Exhibit G, as Mr. Gariboldi does for us.

A I recall this figure. I thought it was six months. The figures are five months.

Q Do you recall being startled by the losses that the firm incurred in April and May of 1970, sir?

A Yes, they were a matter of concern.

Q Did you make any calculations or judgment when the firm was in May running at a rate of loss greater than in 1969?

A I don't recall thinking of it in those terms, no.

Q What terms did you think of it in?

A That something had to be done to either reduce the overhead or to make a merger which would put us in a position to more than break even.

Q Did the loss figures for April and May spur you on to greater efforts to make a merger?

mh9 Kohns-cross

A No, we had been working on the idea for 15 to 18 months.

Q And that was at the same pace, with the same concern?

A It was our realization that a firm of our size needed more volume to support the expense of electronic equipment that we needed.

Q And those efforts did not increase or become any more strong after April and May's loss figures were in, did they?

A No, the volume of the exchange did not expand.

Q I am talking about your efforts to find a merger partner.

A Oh, I'm sorry. I misunderstood your question.

Q Well, now, as you understand it can you answer it? Did you seek any harder to find a merger candidate after you got the results on the $850,000 loss in April and May of 1970?

A No, I don't believe so.

Q Did the loss for 1969 erode the capital of Hirsch & Company for purposes of exchange Rule 325 to the extent of its amount, two million point seven?

A I lost the beginning of the question.

Q Let me do it again, it wasn't too eloquent. Did

t2b pm

Q Well, what did you mean by it?

A I considered him an authority on Wall Street, and when I ran into problems that I realized he would be familiar with I went to him for answers as to how we could handle similar problems and to give us advice.

Q When was the meeting with Mr. Petrillo to which you have been referring in your testimony? Can you place it in point of time?

A I again run into difficulty of not being able to split between the first series of meetings and the second series. I am under the impression it was during the second series but I am far from sure.

Q Do you recall that Mr. Petrillo went on vacation in Europe towards the end of May or the beginning of June of 1970?

A No, I do not.

Q You have no recollection of his being away and returning late in the game, so to speak?

A No.

Q In connection with his assignment, I believe it has been testified that Mr. Gariboldi found substantial discrepancies in long and short positions at Francis I. duPont.

MR. CAMHY: Your Honor, I object to the char-

A The figure that occurs to my recollection is $10 million.

Q Of which difference? The short difference?

A I thought it was on each side.

Q Now coming to your meeting with Mr. Petrillo would you tell us first of all who was present at that meeting and what was said?

A Mr. Hirsch, Mr. Mundheim, possibly but not certainly Mr.Fraiman, and Mr. Petrollo, it is barely possible one other of my partners was there and I am not clear in my recollection on that. I do know that Mr Hirsch , Mr. Mundheim and I were there. And Petrillo was the only non-Hirsch partner there.

Q What was said?

A I said, "Pete, as you know, we are discussing getting together with duPont, we are rather close to an agreement. What do you think of it"?

And he said, "Paul, provided they can get proper management, by which I understood back office management, I think it will be a good idea, or it will work out all right." I then told him what Mr. Edmond duPont had told me regarding the $20 million contract, and he said, "Paul, Emond is a man whose word is better is better than his bond." Considering my opinion of Mr. Petrillo, my reliance on his

knowledge, especially as auditor perhaps of duPont, I considered that a very favorable comment.

Q Let me ask you this: Did you interpret his statement about Mr. Edmond duPont as a character reference?

A Yes, it perhaps had particular application to the $20 million but it was more general than that. Yes, it was a character reference.

Q With respect to his statement that with good back office management he thought things would be all right. What did you understand the meaning of that statement to be?

A That like all of Wall Street and most of New York banks the bookkeeping departments were out of balance and overloaded with paper work. And he was referring to management to overcome those difficulties.

Q Do you recall testifying on deposition that you understood his words to mean that duPont's back office was a bloody mess?

A Do I understand he had said that?

Q No, no. Did you understand his statement that with proper back office management it should be all right, to mean that duPont's back office was a bloody mess?

A I certainly understood it to be a reference to the fact that their back office was in unsatisfactory con-

A I don't know what you mean by the word interest.

Q Did you involve yourself, try to find out things?

THE WITNESS: I don't understand what you mean by interest yourself.

Q Did you try to find out some information?

A Absolutely.

Q Among the information, did you have occasion to see the special operations questionnaire (handing).

A I saw a special operations questionnaire, yes.

Q Just looking at these differences here --

MR. HYDE: May we have the exhibit number?

MR. CAMHY: Yes, it is 52.

Q 10 and 9. Do you recall that as approximately the magnitude of the differences that you were made aware of?

A By reading that, yes.

Q Now, you were negative on the merger, weren't you?

A Yes.

Q Did this have to do with your feeling about what you had heard about their back office?

A Yes.

Q Were you present at a meeting in which the question of these differences was discussed?

A Yes, I was.

Q Can you tell the Court who else was there and what was said?

THE COURT: Also I would appreciate knowing when the meeting was.

Q Yes.

When was the meeting?

A I believe the meeting was some time in the last two or three weeks of June of 1970. I believe there was Mr. Kohns, Mr. Mundheim, Mr. Hirsch. I believe Mr. Framen was there but I amnot positive of that. Mr. Petrillo, Mr. Gariboldi, myself, and I was originally under the impression that one of our attorneys may have been present at the time. I do not whether it was Mr. Taikovsky or Feurst.

Q Did the subject of differences come up?

A Yes, they did. A comment was passed by Mr. Gariboldi to Mr. Petrillo stating the amount of difference that he had discovered on this form as we were reading it together and the comment was passed that you get rather excited and there is nothing to worry about. That was passed by Mr. Petrillo to Mr. Gariboldi.

THE COURT: Would you read back what Mr. Petrillo is supposed to have said? I mean, I didn't get it.

MR. POLLACK: Your Honor, may we have the last

answer reread?

THE COURT: I am asking the same thing. Have the whole question and answer read back.

(Read.)

THE COURT: I still don't get it. We were rather excited? I still don't understand --

(Read.)

BY MR. CAMHY:

Q Now, at that time, or at any time prior to the merger had you ever seen a Haskins & Sells capital computation as at the last audit of the previous settlement which reflected a ratio of 3,242?

A No, I did not.

Q To the best of your knowledge had anybody such as Mr. Gariboldi or anybody on your team who was working on it, had they ever mentioned that to you?

A On my team?

Q Not on your team, on the Hirsch side, yes.

A On the individuals that I worked with --

Q Did anybody ever tell you --

A No, they did not see that.

Q Were you aware that this computation reflected a $6.8 million capital deficiency?

A No, I did not.

Q Were you aware that this deficiency was made up in cash in the month or two following the audit date?

A No, I did not.

Q Were you aware that a subsequent computation by the Exchange as at the audit date added a further deficiency of $8.1 million for dividends on securities failed to received?

A No.

Q Were you aware that the Exchange's subsequent computation fixed ratio at in the 70 thousands magnitude as at the audit date?

A No.

Q Were you aware that the additional deficiency was made up in substantial part by a decision to realize funds out of the sale of long differences in the differences accounts?

A No.

Q Were you aware that that is how to the extent of $6 million capital ratio was achieved?

A If you are using the word aware as versus rumors, no, I did not. Rumors, yes.

Q You say there were rumors around that duPont was doing wrong things?

A There were --

MR. BROOKS: I object.

MR. POLLACK: I object to the form of the question, your Honor.

THE COURT: Objection sustained.

Q Did you receive any information, hard information?

A No.

Q And did you ever communicate anything like that to Mr. Kohns, Mr. Mundheim or Mr. Hirsch?

A No.

Q And was any of that ever said --

MR. CAMHY: Strike that.

Q Did Mr. Petrilloever mention any of these thinys to you?

A Definitely not.

Q And at that meeting at which Mr. Gariboldi complained about these differences, did any of those facts ever come to anybody's attention?

A No.

MR. CAMHY: I have nothing further, your Honor.

THE COURT: Mr. Weil, I am not sure, I would like to know what was your role in connection with the merger?

THE WITNESS: My responsibility was to move all of the firm's securities and customers' securities to the firm of Francis I. duPont.

THE COURT: No, I mean before that.

these problems?

A I believe the comment that he passed was directed at Mr. Petrillo.

Q What did he say?

A At which he stated that there were approximately ten million dollars on either side of differences, and Mr. Petrillo replied as I had quoted before.

Q Was the reason why you didn't go to the duPont firm because of these problems the securities differences and other back office problems that we have just discussed?

A Yes.

Q Was there any problem which you considered relevant in reaching a determination on not to go to the duPont firm which you did not advise Mr. Kohns and Mr. Mundheim?

A No. This is a personal opinion of mine.

Q I agree. But all I want to know is whether you shared that opinion with your fellow partners.

A I don't believe so.

Q When you reported on your visit, or your analysis of the most recent questionnaire, I believe you told me you discussed the fails, the aged fails, the dividends, the securities differences. You told me that you discussed that with Kohns and Mundheim and the other people at the

meeting, is that correct?

A Yes.

Q Now, when they were pressuring you to go to the duPont firm did you tell them that the reason you didn't want to go was because of these back office problems and the difference problems?

MR. CAMHY: I object to the word pressure.

Q Well, is that a fair word, Mr. Weil?

A To pressure me to go to the firm?

Q Yes, to become a partner in duPont.

A Fair enough.

Q Now when they were making entreaties upon you to do that did you tell them that you didn't want to go because of all these problems?

A I probably did among other things, yes.

Q At the time you made that explanation to them did you have any reason to believe that they knew what a difference was?

A Yes.

Q How did you have reason to believe they knew what a difference was?

A During the period of 1968 when the market was extremely busy most firms were not ready for it, and as a result they fell behind in their record keeping. Their

BY MR. CAMHY:

Q Is it clear that the amount under discussion at that time was eight or nine million?

A Yes.

Q Or ten million, in that area?

A Eight, nine, ten, yes.

Q And do you feel that you made it clear enough to Mr. Petrillo or that Mr. Gariboldi did that, there were implications behind the mere number?

A Did Mr. Gariboldi make that--

Q Or you made it clear.

A Mr. Gariboldi did.

Q And it was at that point that Mr. Petrillo said Frank you are getting a little excited over nothing?

A Yes.

Q And as I understand it you felt at that point there just wasn't any point?

A That's right.

MR. CAMHY: All right, thank you.

THE COURT: All right, thank you, Mr. Weil, you may step down.

(Witness excused)

THE COURT: Call your next witness.

MR. CAMHY: Mr. Mundheim, please. Your Honor,

indicated that I don't know what you mean.

Q Did you have any reason to question that Haskins had given the usual clean certificate on their audit?

A No, I did not.

Q Did anybody make it known to you that the exchange had reviewed the situation as at the audit date and assessed additional capital charges of approximately $8.1 million?

A No one told me. I was unaware of that.

Q Did anybody ever inform you that taking those additional capital charges into account the ratio at the audit date ran way into the tends of thousands?

A No, sir.

Q Did anybody ever inform you that the ratio as at the audit date by the exchange's subsequent computation resulted in a $17 million capital deficiency from 325 requirements?

A No, sir.

Q Did anybody ever tell you that the additional amounts assessed by the exchange were made good largely through the liquidation of differences, long differences in the differences account?

A No, sir.

MR. BROOKS: I object, your Honor, that mischaracterization is the evidence. The most that's been shown in the liquidation from the differences account is $6 million and Mr. Camhy has mentioned a $17 million deficiency.

MR. CAMHY: I will make it clear, Mr. Brooks.

Q Did anybody ever suggest to you that approximately $6 million of the deficiency had been made good by the liquidation of long differences?

A No, sir.

Q And you knew what long differences were, didn't you?

A Yes, sir.

Q Did you ever see a material inadequacies letter for duPont?

A No, sir.

Q Did Mr. Petrillo or anybody at Haskins & Sells tell youthat they had a material inadequacy letter for duPont which was substantial and significant?

A No, sir.

Q Getting to July of 1969, do you recall after the merger that the exchange communicated with the partners at duPont informing them that there would be an additional capital requirement that had to be met?

Q And did you do that in writing?

A I did.

Q Tell us what happened after you did that.

A As I remember I sent a letter dated, I believe, December 3, 1970, which was practically the earliest date in which I could so do, advising of my desire to withdraw as a general partner and that I would like to withdraw my funds. And I believe a general partner and a limited partner, I believe. Withdraw my capital as of the end of the year 1970.

Q What happened after you sent the letter?

A After I sent the letter, some days later, I received a telephone call from Mr. Lasker who was the chairman of the board of governors of the New York Stock Exchange telling me that he would like to come over to see me in my office along with Mr. Haack who was the president of the New York Stock Exchange.

Q Now, prior to the call were you aware that Edmond duPont was conducting negotiations with Mr. Ross Perot, of Texas, about the refinancing of duPont Glore Forgan?

A I was aware of it only towards the end of, I believe the end of November, 19 70, because Mr. duPont called a meeting of a group of partners, and I believe

located only in New York as I recollect it at least, in which he told us that he had negotiated with H. Ross Perot and his group.

Q Now, in that connection had you ever heard the name Meyerson? In connection with Mr. Perot?

A Yes, Mr. Meyerson is the name I had heard of.

Q After you sent your withdrawal letter did you hear from Mr. Meyerson?

A Yes, I did.

Tlb

Q And did you hear from him at or about the time you heard from Mr.Lakser or a little bit beforehand?

A I don't know but it is certainly within that time frame.

Q And could you tell us the substance of your call with Mr. Meyerson?

A He came to see me and talked to me about why did I want to withdraw, etc., etc., etc., and he didn't think I should and so forth.

Q Now, Mr. Meyerson was associated with Mr. Perot, was he not?

A He was as I recollect it. He was put into duPont by Mr. Perot. I can't tell you whether he was on the payroll of duPont but he was in the firm as his representative.

Q Now getting to the call from Mr. Lasker, what did you say his position was?

A Mr. Lasker was the chairman of the Board of Governors of the New York Stock Exchange.

Q And Mr. Haack was the president of the exchange?

A Was the president of the stock exchange.

Q Now you tell us about the conversation you had with Mr. Lasker.

A Well, when he suggested coming over to see me at my office I felt that it wasn't the proper thing for them

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to do and I said I would come over and see him. I went over after the close of the market to Mr. Lasker's office and I met with him and Mr. Haack.

Q Could you tell us the substance of that conversation?

MR. POLLACK: Objection, your Honor. I believe that the line of inquiry now does not relate back to what the condition of the firm was at the time that plaintiffs had their transaction of July 2nd pursuant to which they acquired interest in duPont. Although it does not affect our clients directly it seems to me to considerably expand the scope of this case beyond that which is pleaded or which has been the subject of inquiry to date.

MR. CAMEY: Your Honor, there has been a contention by the defendants that the leaving of the money in in December constituted kind of a voluntary waiver or innovation for which they are not responsible and that defendants made a conscious decision to take a chance that December and should be bound by it and in effect we lease, or waive whatever claims they might have had. And my object in adducing this testimony is to show that defendants' efforts in December and thereafter was salvage, that is to say, they were doing the best they could to get their money out of this firm and that it did not have anything to do with a desire on their part to stay in the firm, they

were in a bad situation and they were doing the legitimate salvage that a person does whose gotten into a loss situation.

MR.POLLACK: Your Honor my understanding of the case being presented to this court is quite simple: Did Haskins & Sells or the New York Stock Exchange fail to disclose information in connection with the July 2nd merger or did they make misstatements in connection with the July 2nd merger which were acted upon by the plaintiffs. The conversations of December, 1970, with Mr. Lasker do not relate back and are extremely irrelevant to the issues being tried.

MR. CAMHY: Your Honor, they are relevant to the defense raised by the defendants that we lost our rights by having left our money in. And I have to show --

THE COURT: Mr.Pollack, quite frankly I thought that this testimony was going to relate to something else in respect of the New York Stock Exchange rules and regulations and the manner in which they --

MR.CAMHY: It also relates to that, your Honor.

THE COURT: All right. But nonetheless it does appear to me that this could go to the question of damages so that the objection is overruled.

BY MR. CAMHY:

Q I gather you went over and saw Mr. Lasker and Mr. Haack?

A I did.

Q Would you tell us the substance of that conversation?

A Well, the substance was that they were doing everything they could to induce me to leave my capital in the firm and they indicated to me that if I didn't choose to do so it was likely that Mr. Perot and his group would not put fresh money into the duPont, Glore, Forgan affair.

Q Did you give them a response at that time?

A I gave no response to their request as I felt that I didn't -- I was shocked to hear this and to learn that the top two men of the exchange are bothering, let's say, with me. And I said I'd like to discuss this with my attorney. And they said, well, let's do it right away. So as I recollect I called my attorney and we set up a meeting for maybe two hours later at the attorney's office, and that was the last of the meetingat-- I made no comment and took no decision of any sort as I couldn't without my attorney.

Q When you went to your attorney's office was there a meeting there?

A There was a meeting there.

Q The same day?

A Same evening.

Q Same evening.

A It was two hours after the meeting at the stock exchange.

Q Who was present at the meeting?

THE COURT: Well, I don't think I need that. I think that for your purposes it is sufficient for us to find out what he did. I don't want any conversation with his attorney.

MR. CAMHY: Well, there were things said to him by the exchange your Honor, which go directly to the question of whether he had any choice but to leave his money there.

THE COURT: I thought this was with his attorneys.

MR. CAMHY: No, no. His attorney happened to be present but the otherswere there, Mr. Lasker was there and --

THE COURT: Oh, I'm sorry.

THE WITNESS: Yes.

THE COURT: I thought you were talking about a meeting that he had with his attorney.

MR. CAMHY: No.

THE COURT: This is another meeting --

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MR. CAMHY: The same day Mr. Lasker and Mr. Haack ran up to his attorney's office and they had another session.

A We had a meeting there which was attended --

Q Tell us who was there up at the lawyer's office.

A At the lawyer's office there was Mr. Lasker, Mr. Haack, Mr.Meyerson, the Perot representative, I believe Mr. Hart who was also a Perot man, I think he was the president of EDS.

Q Was that Electronic Data Systems?

A Electronic Data Systems.

THE COURT: This was at your --

THE WITNESS: At my lawyer's office.

A Also present was -- in the office -- was Mr. Kohns, Mr. Hirsch and Mr. First. And then another man from the exchabge, and I am not sure whether it was Mr. Rohayton--

Q Felix Rohayton.

A Or Mr. D'Annunzio.

Q Were they officers of the exchange or governors?

A I believe both were governors but I am frankly not certain.

Q Did you know how Mr. Kohns and Mr. Hirsch got there?

A No, I don't.

Q Did you invite them?

A No.

Q You were surprised to see them there, weren't you?

A I was surprised.

MR. BROOKS: I object to leading questions.

THE COURT: All right.

A I don't know how they got up there.

Q Someone evidently had summoned them up there too, hadn't they?

MR. BROOKS: Objection.

THE COURT: All right, objection sustained.

T2a

Q Would you tell me what was said and who was present during the conversation, I gather some people were in the conversation and some people were out?

A In the conversations that I -- in the conversation with Mr. Haack Mr. Lasker and this other gentleman, either Mr. D'Annunzio or Mr. Rohatyn. And I was told--

Q Were Mr. Kohns and Mr. Hirsch there?

A They were not.

Q They were outside?

A Yes, they were outside.

Q Was your lawyer there?

A I believe -- yes, Mr. Fuld I believe was there. I was told in very direct language that I couldn't get my money out whether I wanted to or not because the money wasn't there, and that Mr. Perot would not put any money in unless Hirsch money -- and he started with me -- was left in.

THE COURT: Who told you that?

THE WITNESS: Mr. Lasker, I believe, or Mr. Haack. But it was --

THE COURT: It wasn't told by any of the representatives of Perot?

THE WITNESS: They were there, your Honor, and-- well, at a later date-- so this shocked me frankly when

I heard this.

THE COURT: Well, what I am really trying to find out is where it came from. It came from the members of the stock exchange?

THE WITNESS: I am vague on that, sir.

THE COURT: All right.

THE WITNESS: It may have come from Mr. Meyerson or both, or at least it was corroborated.

THE COURT: All right.

BY MR. CAMHY:

Q Did Mr. Haack or Mr. Lasker try to impress you with the seriousness of the consequences of Mr. Perot not putting his money in?

A Yes, indeed. Because it was said, and I can't tell you just which person said it, but it was indicated to me that a great deal of effort and a great deal of work had gone in on this duPont matter by the exchange-- I am using the exchange in the sense of the people involved-- that they were not -- they weren't going to see this thing go down.

Q Did they tell you what the implications were if it went down?

A The implications were that duPont would be out of business.

Q And what else?

Q And then as this industry is a domino industry of the receipts and deliveries to other brokers there is just no telling how far spread this kind of a tragedy can be. We went out of the room to talk -- I talked to my attorney, and he said there is nothing you can do. You can't get your money according to what they tell you. And you are-- I am going to have to make the decision of whether I want to pull this house of cards down or not. I then decided that I would make a -- try to find a compromise and came to the conclusion that if I were given 25 per cent of my capital promptly on due date that I would leave 75 per cent of it in forgetting what the form is, but always as subordinated. Mr. Hirsch and Mr. Kohns as we were outside of the room with the others went along with this idea. I went back into the meeting with Mr. Meyerson, Mr. Haack, Mr. Lasker, etc. and told them of my suggestion and they didn't think it was acceptable. Well, I said, that's it or nothing. At that point either Mr. Meyerson or Mr. Hart went out of the room to contact, they said, Dallas, Texas, which is the headquarters of Mr. Perot and so forth. Anyway I don't know whether they did or they didn't but they came back into the room and said that that was acceptable.

Q And was this the agreement in principle which led

up to the December written agreement which is in evidence reflecting the decision of certain of the Hirsch partners to leave their money in?

A Yes, it is.

Q I believe that's the agreement of December 14, 1970, which is Plaintiffs' Exhibit 7 in evidence. I show you Plaintiffs' Exhibit 4 and ask you whether this is the letter which you sent to the duPont firm seeking to withdraw your capital (handing).

A Yes, this letter of December 3rd.

Q December 3rd.

A Yes.

MR. BROOKS: Your Honor, I believe Mr. Camhy made a mistake when he identified the December 14th agreement as Plaintiffs' Exhibit 7. We don't appear to have a 7 on our list but we do know that it did go in yesterday as Exchange Exhibit N.

MR. CAMHY: Exchange Exhibit N?

MR. BROOKS: That's correct.

MR. CAMHY: That's all right with me, your Honor.

THE COURT: There is another, a plaintiffs' exhibit that --

MR. CAMHY: Yes, but Mr. Brooks is right, your Honor. I offer Plaintiffs' Exhibit 4 in evidence.

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MR. CAMHY: Mr. Speicher, please.

M I L T O N A. S P E I C H E R, recalled.

THE COURT: I gather that Mr. Speicher is being called for a very limited purpose.

MR. CAMHY: Yes, very limited.

MR. POLLACK: Your Honor, since we object to the recall of Mr. Speicher may I inquire through the court of the subject area that Mr. Camhy intends to question Mr. Speicher on?

THE COURT: All right. I didn't inquire of that because I thought that Mr. Camhy had probably told you in view of what occurred. What purpose is he being called for?

MR. CAMHY: Mr. Speicher was a partner of duPont who had as good a familiarity with its financial affairs and capital position in December of 1970 as could be had. Any familiarity was difficult because of the circumstances. But he did have as good a familiarity as could be had. And that he expressed an opinion in court papers at one point that in his opinion this money could not be withdrawn in view of the capital position of the company at that time.

MR. POLLACK: There is a question of relevance of any such opinion in these proceedings.

MR. BROOKS: Your Honor, I don't think Mr. Speicher

is qualified to give an opinion. He is not an expert. He can tell us what the facts were but I don't think he can tell us his opinion.

MR. CAMHY: He can state his belief which he did.

MR. BROOKS: I think that's a different word for an opinion.

MR. CAMHY: I agree, your Honor.

THE COURT: All right.

BY MR. CAMHY:

Q Mr. Speicher, were you active in duPont's affairs in December of 1970?

A I was a limited partner and employee at that time.

Q Yes, but did you have available to you the financial information which was available at that time, the audit?

A Yes.

Q And you had been just prior to that a financial partner at the firm, hadn't you?

A Yes.

At the time you are talking about is before the 15th of December, is it not?

Q That's correct, in connection with the Perot reorganization.

A Yes.

Q Now wasn't the firm then under strong capital

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pressure from the exchange?

A It was.

Q And didn't that capital pressure from the exchange cause you to believe at that time that it would be highly unlikely, if not impossible, for a partner such as Mr. Mundheim, Mr. Kohns and Mr. Hirsch to withdraw their capital at that time?

MR. BROOKS: I object to the question, your Honor. Mr. Speicher's belief is not competent, admissible evidence and is irrelevant.

THE COURT: I think that's right.

MR. CAMHY: Well, Mr. Speicher had knowledge of the facts of the company's capital situation.

THE COURT: Then why don't you ask him that? Why don't you ask him that? Did he express his belief to these gentlemen? Did he tell them they couldn't withdraw their money?

MR. CAMHY: I don't know that he did, your Honor. He did at a later date, yes.

THE COURT: Well, why don't you ask him the facts, if he knows the facts could their money have been withdrawn if he knows?

Q That's the question, could their money have been withdrawn at that time?

A We are speaking about Mundheim now, are we?

Q Mundheim, Hirsch and Kohns.

A This would be before the agreement made on the 14th of December --

Q Yes, in connection with Perot putting the money in.

A -- which had not had the Perot money put in yet.

Q That's right.

A And that ten million was needed which they were going to contribute in order to keep us in compliance.

Q Right.

A Without the ten million we would not have been able to withstand a withdrawl and the exchange might well have been of the mind to say you can't take it out. That's what I was trying to say on that --

MR. BROOKS: Your Honor, I move to strike the portion of the testimony which said the exchange might well be of the mind to not permit them to take it out as incompetent from this witness.

THE COURT: No, that motion is denied.

MR. CAMHY: Your Honor, may I now read Mr. Speicher's statement from an earlier affidavit which is confirmatory but slightly different?

MR. POLLACK: I object to the reading if it is

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confirmatory. Furthermore these are statements made in another litigation.

THE COURT: The objection is sustained.

MR. CAMHY: No further questions.

THE COURT: All right, Mr. Brooks, do you have any questions?

MR. BROOKS: Yes.

BY MR. BROOKS:

Q Mr. Speicher, isn't it a fact that a number of Hirsch partners were permitted to withdraw their money in the same transaction by which Messrs. Kohns, Hirsch and Mundheim elected to keep their money in?

A Yes, but that was 16 days later. That's true.

MR. BROOKS: Thank you, sir.

THE COURT: Mr. Hyde?

MR. HYDE: I have no questions, your Honor.

THE COURT: Thank you very much, Mr. Speicher.

(Witness excused)

THE COURT: All right, call your next witness.

MR. CAMHY: Mr. Hirsch please.

THE COURT: I am of the opinion that except for matters which relate to Mr. Hirsch very personally that the matters that have been exposed here with regard to the investigation and things of that kind, that I don't think

we are going to need any further testimony on.

MR. CAMHY: I understand, your Honor.

THE COURT: I think we do need to know and have in the record something about Mr. Hirsch and his knowledge and skills.

H O W A R D C. H I R S C H, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CAMHY:

Q Mr. Hirsch, how old are you now?

A I am 79 -- I am 78 and a half. Over 78 and a half.

THE COURT: Can you hear that?

MR. BROOKS: Not too well, your Honor.

MR. HYDE: I think if Mr. Camhy stood over here, the witness is directing his remarks to Mr. Camhy.

THE COURT: Maybe if you stood back it would be helpful, it would force Mr. Hirsch to put some strain on his vocal cords.

THE WITNESS: Yes, sir, I will speak louder, your Honor.

THE COURT: All right.

Q Mr.Hirsch, how old are you?

A I was 78 on the 10th of September of this year.

it founded?

A In 1911. Although my father was a member of the stock exchange before that.

Q Did you remain in Hirsch Lillienthal or successor companies after you went to it -- what year did you say?

A Yes, until its dissolution.

Q I have forgotten the year that you said that you went in.

A March, 1920.

Q What were your duties at Hirsch Lillienthal over those years?

A Well, in the first two years going through practically every department in the firm. Subsequently, in 1922, I became a member of the New York Stock Exchange. I also became a member of the American Stock Exchange, I don't remember when, but successively either as a member or on various committees of other exchanges or in their formation.

Q When did you become the head of the firm?

A Upon the death of my father in 1938.

Q At what point did you have Mr. Kohns as your assistant?

A That's rather difficult to state. Progressively

I should say in the last five or ten years before dissolution he occupied more and more important positions, or dominant positions.

Q In 1968 and 1969 approximately how many branches did the firm have?

A I can't remember. I think it was 16.

Q Approximately how many people were on its payroll including registered representatives?

A I think something like 600.

Q Did the various departments have administrative personnel over them?

A Yes.

Q Did you involve yourself in the internal and day to day affairs of the various departments?

A For mahy years, yes.

Q I am talking about 1967, '68, and '69.

A I involved myself almost more in the foreign, in their foreign business than in any other. I was a member of numerous organizations, committees.

Q By that time you were certainly, were you not, familiar with the meaning of phrases like fails, fails to receive, fails to deliver?

A Yes.

Q And the requirement of segregation of securities?

A Yes.

Q And securities count differences?

A Yes.

Q Long differences and short differences?

A Yes.

Q ... ou knew about things like capital computation? Rule 325 capital computation?

A I relied on others to carry them out.

Q Yes, but you knew the inherent principles of them, didn't you?

A I knew they were required, yes, but I never attempted to do it myself.

Q And you knew about 1,000 ratio and 1,500 ratio and 2,000 ratio and the implications of those numbers, did you not?

A Certainly.

Q And you knew that differences could have an impact on ratio depending on how they were computed, isn't that right?

A Yes.

Q Now I ask you, Mr. Hirsch, whether you were ever shown or knew of a capital computation for duPoint made by Haskins & Sells as at a previous audit date which showed a ratio in excess of 3,000 for duPont.

A No, not before the merger or sale.

Q I ask you whether you knew before the merger about a 6.8 million dollar capital deficiency in duPont for 325 purposes as at the audit date.

A No.

Q I ask you whether you knew about an additional deficiency asserted by the New York Stock Exchange personnel of approximately $8.1 million over and above the $6.8 million before the merger.

A No.

Q The answer is no?

A No.

Q And I further ask you whether you had ever heard that the ratio of duPont had been computed by stock exchange personnel as at the audit date in the 70, 76,000 range.

A No.

Q Would all of those facts have had an impact on you?

A Yes.

Q Were you made aware during the period immediately prior to the merger by Mr. Gariboldi or Mr. Norman about a negative feeling on their part about the merger because of securities differences?

A I wouldn't say a negative feeling, if I may answer that way. Yes, I was aware of a negative feeling.

Q And did you nevertheless elect to proceed with the transaction anyway?